



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



PRESENTED TO THE UNIVERSITY  
BY THE RHODES TRUSTEES

S. 200.13 r 3

300.13 Y. 130.

400.17 v 52







---

THE

**Canadian Freeholder :**

DIALOGUE II.

---

THE HISTORY OF THE

AMERICAN PEOPLE

**THE**  
**Canadian Freeholder :**

**IN**  
**THREE DIALOGUES**  
**BETWEEN AN**  
**ENGLISHMAN and a FRENCHMAN,**  
**SETTLED IN CANADA.**

**SHewing**

The Sentiments of the Bulk of the Freeholders of Canada concerning the late Quebec-Act; with some Remarks on the Boston-Charter Act; and an Attempt to shew the great Expediency of immediately repealing both those Acts of Parliament, and of making some other useful Regulations and Concessions to his Majesty's American Subjects, as a Ground for a Reconciliation with the United Colonies in America.

---

**V O L. II.**

---

**L O N D O N :**

Sold by **B. WHITE, HORACE'S HEAD, Fleet-Street,**

**M. DCC. LXXIX.**

THE  
CONSTITUTION  
IN  
HISTORY

BY  
J. H. BURNETT

UNIVERSITY  
OF LONDON



---

## P R E F A C E.

**T**HIS second Dialogue of *The Canadian Freeholder* contains an examination of the reasons and authorities alledged by Lord Mansfield, the lord chief justice of the Court of King's Bench, in support of the following doctrine, which he laid down in the month of November, 1774, in delivering the judgement of the court in the case of Campbell and Hall, to wit, *That, upon the conquest of any country by the British arms, and a subsequent cession of it by its former sovereign to the Crown of Great-Britain, the king becomes the sole legislator of such country, and has a right to make laws for, and impose taxes on, the inhabi-*

*inhabitants of it by his single authority, or without the concurrence of the parliament; unless the said authority shall have been previously limited, or restrained, by an act of parliament antecedent to such conquest and cession."* This is the main subject of this dialogue: but there are some other matters, relating principally to the government of the American colonies, occasionally introduced in it. The more particular contents of it may be described as follows. .

The 11 first pages are taken up in stating the two different opinions which lawyers have entertained upon this subject, and the doctrine laid down by Lord Mansfield in delivering the aforesaid judgement of the Court of King's Bench.

The 12th and 13th pages contain a state of the three grounds, or reasons, assigned by Lord Mansfield in support of the said doctrine; to wit, 1st, The king's right to make war  
and

# P R E F A C E. vii

and peace ; 2dly, The practice which has taken place with respect to countries conquered by the Crown of England ; and 3dly, The opinions of judges and other lawyers of eminence upon the subject.

Pages 13, 14, 15, 16, 17, 18, 19, 20, are employed in examining the first of the said three reasons, which is stated in Lord Mansfield's own words in page 15.

Page 21, &c.---40, are employed in shewing the importance of this question to all the subjects of the Crown of Great-Britain, and the mischievous consequences to the liberty of Great-Britain itself that might follow from Lord Mansfield's doctrine.

Pages 41, 42, 43, and 44, contain an argument that has been used by some private lawyers in support of Lord Mansfield's opinion. This argument is answered, and the subject further examined upon the footing of reason and the general principles of law,



law, in the following pages down to page 63; which concludes that first part of the discussion of this question.

In page 64 Lord Mansfield's second head of argument, from historical precedents of countries conquered by the Crown of Great-Britain, is taken into consideration.

In pages 65 and 66 Lord Mansfield's assertions concerning Ireland are stated. And they are examined in the following pages down to page 75.

Page 75, &c.---79, contain some remarks concerning the legislative authority over the inhabitants of the island of Grenada in the West-Indies, grounded on the Stat. 6 Geo. I. concerning Ireland, and on the 6 Geo. III. concerning the supreme legislative authority of the parliament of Great-Britain over all the British dominions in America, which was a declaratory statute.

In

In pages 79 and 80 Lord Mansfield's assertions concerning Wales are stated. And they are examined in the following pages down to page 150; which contain some curious particulars concerning the antient state of Wales before its final reduction by king Edw. I. in the year 1284, supported by the testimony of the venerable historian, Matthew Paris, and other respectable authorities.

In page 151 the other places mentioned by Lord Mansfield as instances of the exercise of the king's sole legislative power over conquered countries, are taken into consideration; which are, Berwick upon Tweed, the town of Calais in France, the dutchy of Guienne, or Gascony, in the same kingdom, the province of New-York in North-America, and the town of Gibraltar and island of Minorca, which were formerly a part of the Spanish monarchy.

## P R E F A C E.

Page 152 contains Lord Mansfield's words concerning the town of Berwick upon Tweed; which were very few. It also contains remarks upon them, which are continued in pages 153, 154.

Page 155 contains Lord Mansfield's words concerning the dutchy of Guinne, or Gascony, and the town of Calais. And pages 156, &c.---164, contain an examination of them.

In page 164 the political situation of the province of New-York is taken into consideration. Lord Mansfield's assertions concerning it are cited in pages 166, 167. In pages 168, &c.---173, an account is given of the manner in which that province was claimed and conquered by king Charles the 2d, taken from Mr. Smith's history of it; by which it appears that the said province was not considered by king Charles the 2d as *a conquered country*, but as *a planted country*, namely, as a part

part of the more antient English colony, or plantation, of New-England.

In page 173 an inquiry is begun concerning the legislative authority claimed by the Crown over colonies planted by Englishmen ; and it is continued in the following pages down to page 200. It contains (amongst other things that are curious and interesting to such persons as are desirous of knowing the political state and history of the American colonies,) an account of the government of the province of New-York from the conquest of it in 1664 to the year 1691, taken from Mr. Smith's History aforesaid. This account is contained in pages 186, 187, &c.---196.

In page 200 an inference is drawn from the declaratory statute of 6 Geo. III. 1766, to shew that the king alone does not now claim to be the sole legislator of any of the American dominions of the Crown. And in pages 200 and 201 a like inference is  
b 2 drawn

drawn from the late act for the government of the province of Quebec.

In pages 201 and 202, an objection is made to the last inference: which objection is grounded on the king's proclamation of October, 1763, which is understood by some persons to have contained an immediate resignation, on the part of the Crown, of its legislative authority over the four new governments of Quebec, East-Florida, West-Florida, and Grenada, which were erected by it. This objection is examined in the following pages down to page 215.

In page 216 another objection is made to the same inference from the late Quebec-act. This objection is grounded on the conduct of the Crown with respect to the province of Quebec from the 10th of August, 1764, when the civil government of the said province was established by the publication of General Murray's commission

sion of civil government, to the year 1774; in which the late Quebec-act was passed. And it is examined and answered in the following pages, down to page 224.

Pages 224, &c.---240, contain some remarks on the nature of instructions to governours of provinces under the king's signet and sign-manual, and on the difference between such instructions and the commissions of governours under the great seal, and on a remarkable clause in those commissions, which contains a reference to the instructions, and seems intended to adopt them, (as it were,) into the commissions, or give them an equal degree of authority with the commissions themselves, without reciting them in the said commissions.

Pages 241, &c.---268, contain a conjecture concerning the reasons that may have been the occasion of the insertion of the said clause of reference in the commissions of governours under the

the great seal; with some remarks on the proceedings of secretaries of state in England, and on the danger of permitting the servants of the Crown ever to exert extraordinary powers, not agreeable to the known laws of the land, under pretences of publick danger or necessity.

Pages 269, &c.---277, contain some remarks on the ordinances passed by the governour and council of the province of Quebeck before the late Quebeck-act.

In page 277 the main argument concerning the king's legislative authority over conquered countries is resumed. And in pages 278, 279, Lord Mansfield's words concerning the exercise of the said authority in Gibraltar and the island of Minorca are recited.

In pages 279, 280, Lord Mansfield's assertions concerning Gibraltar are examined; and the same thing is done in pages 281, 282, &c.---288, with respect to his assertions concerning Minorca,

## P R E F A C E. iv

norca. And herewith ends the examination of Lord Mansfield's second head of argument in support of the king's sole legislative authority over conquered countries, which is derived from historical precedents, or examples.

The remaining part of Lord Mansfield's speech in delivering the judgment of the Court of King's Bench in the case of Campbell and Hall, is recited in pages 289, &c.---295; in which is contained his third head of argument in support of the said legislative authority of the crown, which is grounded on the opinion of judges and other lawyers of learning and eminence, and particularly on the opinion of the judges in Calvin's case in the reign of king James the 1st and on that of Sir Philip Yorke (who was afterwards Lord Chancellor and Earl of Hardwicke,) and Sir Clement Wearg in the year 1722 concerning the island of Jamaica, when they were in the  
offices



offices of attorney and solicitor general to king George the 1st.

Page 296, &c.--300 contain remarks on those two authorities, shewing that the opinion of the judges in Calvin's case, instead of favouring the doctrine advanced by Lord Mansfield, was really contrary to it; and that the opinion of Sir Philip Yorke and Sir Clement Wearg, (which is acknowledged to have been agreeable to Lord Mansfield's doctrine,) was, according to Lord Mansfield's account of it, a very hasty opinion, upon which those learned lawyers appear to have bestowed very little attention, and that it must also be considered as having but a small degree of authority in deciding a matter of this importance in favour of the Crown, on account of the byas which those gentlemen must be supposed to have had upon their minds in favour of that side of the question, from their possession of the offices of attorney and solicitor general.

In

In page 300 the authority of Calvin's case is further considered; and in the following pages 301, &c.--323, a very full account is given of that famous case, with a copious extract from it: which is followed by some remarks upon the said case in pages 323, &c.--328.

Pages 328 and 329 contain a conjecture concerning the cause of Lord Mansfield's citing the opinion of the judges in Calvin's case as an opinion in support of his doctrine of the king's sole legislative authority over conquered countries, though in truth it makes against the said doctrine.

Pages 330, &c.---342 contain an historical account of the disputes in the beginning of king James the 1st's reign concerning the right of the *Post nati*, (or persons born in Scotland after the accession of king James to the crown of England,) to the privileges of natural-born subjects of the crown of England; which gave rise to the aforesaid case of Calvin.

Pages 343, &c.---347, contain an inquiry how far the aforesaid opinion of Lord Mansfield concerning the power of the Crown over conquered countries, delivered in the said judgment in the case of Campbell and Hall, ought to be considered as the opinion of the other judges of the Court of King's Bench.

Pages 347, &c.---366 contain a recapitulation of the principal conclusions established in the foregoing pages in opposition to Lord Mansfield's argument in support of the sole legislative power of the Crown over conquered countries.

Pages 367, &c.---370 contain remarks on Lord Mansfield's peremptory manner of asserting the sole legislative authority of the Crown over conquered countries.

Pages 370, 371 contain a remark on Lord Mansfield's first assertion on this subject, viz. "*That the king's legislative right over a conquest has never been denied in Westminster Hall.*"

Pages

# P R E F A C E. xix

Pages 372 and 373 contain a remark on his second assertion, "*That the king's legislative right over a conquest was never questioned in parliament.*"

Pages 373, &c.---379, contain some remarks on his third assertion, "*That no book, no saying of a judge, no opinion of any counsel, publick or private, has been cited on the other side;*" together with an extract from a learned modern treatise on the Law of Nations written by an eminent author, of the name of *Vattel*, which is directly contrary to Lord Mansfield's doctrine of the king's being the sole legislator of conquered countries, and which was cited in one of the arguments of the said case of *Campbell and Hall* before Lord Mansfield, by the late ingenious *Mr. Allen*, one of the counsel of the plaintiff *Campbell*.

Pages 379, &c.---385, contain different accounts of an opinion given by that learned and upright lawyer, Sir William Jones, while he was at-

torney general to king Charles the 2d, and probably about the year 1677, against the sole legislative authority of the Crown over the American plantations.

Pages 385 and 386 contain an account of an opinion of Mr. Lechmere, in the year 1717, while he was attorney-general to king George the 1st, that is nearly to the same effect with that of Sir William Jones. It is also remarked in page 386 that these two opinions of Sir William Jones and Mr. Lechmere may fairly be set in opposition to the opinion of Sir Philip Yorke and Sir Clement Wearg in the year 1722.

In page 387 an inquiry is begun concerning the effect of Lord Mansfield's declaration of his opinion, in favour of the sole legislative authority of the Crown over conquered countries, in the judgement he delivered in the said case of Campbell and Hall; that is, whether, or no, the said declaration

claration of his opinion is a decisive establishment of that doctrine, though it should before have been held to be doubtful or erroneous. This inquiry is prosecuted in the following pages 388, 389, &c. to page 399; and in the course of it the determinations of courts of justice are divided into four different classes, that have different degrees of weight and authority belonging to them; and it is shewn that this decision of the Court of King's Bench in favour of the king's sole legislative authority over conquered countries, (even if we suppose that the other judges of that court concurred with Lord Mansfield in making it,) is only a decision of the fourth, or lowest, class.

The few remaining pages of the Dialogue contain a remark on the expediency of settling the law on this subject by act of parliament, in a manner contrary to Lord Mansfield's doctrine.

This

## xxii P R E F A C E.

This is as particular an account of the contents of this Second Dialogue as seems necessary to be given of them in a Preface, in order to apprise the reader beforehand of the nature of the entertainment that is set before him. They are drawn out more fully and distinctly in the abstracts of them which I have caused to be printed in a smaller letter in the margin of the book, and which, I hope, the reader will find to be very convenient to him in referring to particular parts of the Dialogue after he has read it.

THE







---

THE  
Canadian Freeholder.  
DIALOGUE II.

---

FRENCHMAN.

**I** HAVE waited with impatience for this second meeting, in which you have promised to inform me of the doctrine of the law of England concerning the extent of the prerogative of the crown of Great-Britain with respect to conquered countries. I hope you are now at leisure to perform your promise, and let me know what I ought to think upon this important subject. For, as I am myself become a subject of

VOL. II.                      B                      his

Of the legislative power of the Crown with respect to conquered countries.

his Majesty in consequence of the conquest of Canada in the late war, it is natural for me to desire to know the whole of the relation in which I stood to him after the cession of the country to the Crown by the late peace, and before the publication of the royal proclamation of October 1763, which made us partakers of the English laws and constitution, but which, to our great misfortune, has been rescinded by the late Quebec-act.

## ENGLISHMAN.

Uncertainty  
of the law  
upon this  
subject.

I remember my promise, and am ready to use my best endeavours to perform it. But I much fear they will not be successful. Indeed they hardly can be so in the degree you wish for, so as to enable you to form a clear and positive opinion upon this question on the one side or the other: because the English lawyers themselves are divided in their opinions upon it. For there are some lawyers who think that the king has no more power over conquered countries, that have been finally ceded to the crown of Great-Britain by their former sovereigns, than

The opinion  
of one set of  
lawyers upon  
it.

than over countries that have been planted by colonies of Englishmen with the permission and encouragement of the Crown, or than over Great-Britain itself; that is, that he has the whole of the executive power over them, but only a part of the legislative. He may therefore, according to this opinion, appoint the governours, and judges, and sheriffs, and justices of the peace, and other officers of justice, in such conquered countries; and may receive, and dispose of, all the publick revenues already legally subsisting in them, and appoint the necessary officers for that purpose; and may raise, and arm, and command, the militia of such countries, in case they should be either invaded by foreign enemies or disturbed by domestick insurrections: but he cannot make laws for them, or impose new taxes on them, by his single authority; but only in conjunction with the two houses of the British parliament, or with an assembly of representatives chosen by the inhabitants of those countries themselves respectively. This is the opinion of one set of lawyers in England. But there are other lawyers of great

The opinion  
of another  
set of lawyers  
upon it, who  
ascribe more  
power to the  
Crown.

eminence, who ascribe to the crown a greater degree of legislative power over conquered and ceded countries than over Great-Britain, or the provinces planted by English colonies. But yet, if I understand them right, they do not allow the king a compleat and entire legislative authority over such countries, but acknowledge his power to be limited by such previous acts of parliament, made before such conquered countries were acquired, as were expressly declared to comprehend them when they should be acquired; to all which acts either himself or his predecessors must have given their royal assent. Of this kind is the statute of the first year of queen Elizabeth, for abolishing the authority of the pope, and all other foreign jurisdiction, in spiritual matters in England and the other dominions of the Crown, which enacts, “ that no foreign prince, person, “ prelate, state, or potentate, spiritual or “ temporal, shall at any time after the last “ day of the then session of parliament, use, “ enjoy, or exercise, any manner of power, “ jurisdiction, superiority, authority, pre- “ eminence, or privilege, spiritual or ecclesi- “ astical,

"astical, within this realm, or within any  
 "other your Majesty's dominions and countries,  
 "that now be, or hereafter shall be; but  
 "from thenceforth the same shall be clearly  
 "abolished out of this realm and all other  
 "your Majesty's dominions for ever." And  
 of this kind is the statute of the fifteenth  
 year of the reign of king Charles II. chapter  
 7, intituled, "*An act for the encouragement*  
 "*of trade;*" in the seventh section of which  
 it is enacted, "that, after the 25th day of  
 "March, 1664, no commodity of the  
 "growth or manufacture of Europe shall  
 "be imported into any land, island, plant-  
 "ation, colony, territory, or place, to his  
 "Majesty belonging, or which shall hereafter  
 "belong unto, or be in the possession of, his  
 "Majesty, his heirs and successors, in Asia,  
 "Africa, or America, (Tangier only ex-  
 "cepted) but what shall be laden and  
 "shipped in England, Wales, or the town  
 "of Berwick upon Tweed, and in English-  
 "built shipping." And of this kind also  
 is the statute of the 7th and 8th years of  
 the reign of king William and queen Mary,  
 chap. 22, intituled, "*An act for preventing*  
 "*frauds,*

*“ frauds, and regulating abuses, in the Plant-*  
*“ ation Trade,”* by which it is enacted,  
*“ That, after the 25th day of March in*  
*“ the year 1698, no goods or merchandizes*  
*“ whatsoever shall be imported into, or ex-*  
*“ ported out of, any colony, or plantation,*  
*“ to his Majesty in Asia, Africa, or Ame-*  
*“ rica, belonging, or in his possession, or*  
*“ which may hereafter belong unto, or be in*  
*“ the possession of, his Majesty, his heirs, or*  
*“ successors, in any ship or bottom but what*  
*“ is or shall be of the built of England, or*  
*“ of the built of Ireland, or of the built of*  
*“ the said colonies or plantations.”* These  
 acts of parliament, and others of the like  
 kind, or which expressly relate to the fu-  
 ture, as well as present, dominions of the  
 Crown, are considered by these latter lawyers  
 as restraints upon the legislative authority of  
 the Crown over conquered and ceded coun-  
 tries; insomuch that they hold that the king  
 cannot, by his single authority, either repeal  
 these acts with respect to such countries, or  
 make any other laws for such countries that  
 shall be inconsistent with them. But this  
 they declare to be the only limitation of the  
 king's

king's original legislative authority over such countries immediately after the conquest and cession of them, and affirm that in all other matters, not settled by such previous acts of parliament, he may, after the conquest and cession of any country, make and unmake laws for it by his own single authority, in whatever manner he shall think fit, as freely as he may make and unmake laws for the kingdom; or island, of Great Britain in conjunction with both houses of parliament. This they consider as the original legislative authority belonging to the Crown over a conquered and ceded country in consequence of the conquest and cession of it. But they allow that the king may afterwards, by his own act under the great seal of Great Britain, divest himself and his successors of this high legislative authority, and grant to the people of the conquered and ceded country the privilege of being bound by no laws but such as shall be made for them either by the king and parliament of Great Britain, or by the king, or his representative the governor of such ceded country, in conjunction with the representatives of



The latter opinion has been adopted by Ld. Mansfield and the other judges of the court of King's-Bench in England.

of its inhabitants. And, when this privilege has once been so granted by the Crown to the inhabitants of such a ceded country, these lawyers hold that it can never be resumed except by act of parliament. The opinion of these latter lawyers seems best intitled to be considered as *the law* upon this subject, because it has been solemnly adopted and declared by lord Mansfield, the chief justice of the King's-Bench in England, and the other judges of that great court, in their judgement on the case above-mentioned of Campbell against Hall. For they then declared that the said four and a half per cent. duty imposed on the inhabitants of Grenada by the king's letters patent of July, 1764, and which the plaintiff Campbell had been compelled to pay to the defendant Hall, (who was the collector of the customs in that island) on certain sugars of the growth of that island which he, the said Campbell, had exported from thence, was illegally imposed, and ought not to have been collected, merely because the king had, by his proclamation above-mentioned, of October, 1763, (which was antecedent to the said letters patent of July, 1764,

1764, which imposed the said duty,) divested himself of the power he had before possessed, by virtue of the conquest and cession of the said island, of making laws and imposing taxes on the inhabitants of it at his pleasure; and that, if the said duty of four and a half per cent. on goods exported had been imposed by his Majesty before the said proclamation of October, 1763, (which communicated to the inhabitants of Grenada the free constitution of the other royal governments in America) had been published, it would have been legally imposed, and the plaintiff Campbell would have been legally bound to pay it.

This was the judgement of the Court of King's-Bench in that celebrated cause, which was argued three different times before them by some of the ablest lawyers at the English bar. And therefore I think it may be said to be now the law of England upon this subject, there being (as I am told) no other decision upon this point, either one way or the other, in all the volumes of the English law. Yet, if it were not for this great

VOL. II. C authority,

Yet the former opinion seems most agreeable to reason.

authority, I should, from the mere reason of the thing, have been inclined to the opinion of the other lawyers who hold that the King, Lords, and Commons conjointly, who are the legislature of Great-Britain itself, must necessarily become the legislature of every country which, by conquest or cession, becomes dependant on Great-Britain; and, in general, that that man, or body of men, which possesses the right of making laws for any conquering country, must of course become possessed of the same right with respect to every country which is conquered by, and ceded to, it.

## FRENCHMAN.

That seems to be a much more rational opinion than the other, which, you say, has been adopted by the judges of the court of King's-Bench in England, supposing the point to be quite new and open to arguments deduced from reason only and the general principles of government and the law of nations. I therefore imagine there must have been some positive law, or some decision of a court of justice, that either established, or seemed

seemed to acknowledge, the other opinion, or that the practice with respect to countries conquered by the crown of Great-Britain has been favourable to it. For without some such powerful argument from authority it is hardly to be conceived that those learned and able judges would have determined, that the king of Great-Britain, who, in his single capacity, is only the first magistrate of that kingdom, and intrusted with the executive power of the state, but not with that of making or repealing laws for it, except with the concurrence of the parliament, should, upon conquering another country with the arms and treasure of Great-Britain, become instantly possessed of an absolute power of making what laws he pleased for that country without any concurrence of the parliament of the nation by whose arms and for whose sake the conquest was made. I therefore desire you would inform me upon what grounds the judges of the court of King's-Bench in England founded that opinion of the king's being the absolute legislator of all countries that are conquered by the British arms except in those points in

C. 2

which

which his legislative power is restrained either by acts of parliament made before the conquest of such countries, or by acts of parliament, or royal proclamations or charters, or other acts of state, made by himself after the conquest of them.

## ENGLISHMAN.

The reasons assigned by Lord Mansfield in support of the latter opinion.

First, the king's right of making peace and war.

Secondly, the practice which has taken place with respect to conquered countries.

The reasons assigned by the lord Mansfield, the chief justice of the court of King's-Bench, in delivering the judgement of the said court in the aforefaid case of Campbell and Hall, in support of this opinion of the legislative power of the Crown over conquered countries, seem to be reducible to these three; to wit, First, the king's acknowledged right of making peace and war, which he supposed to include in it the power of making laws and imposing taxes on the conquered people; Secondly, the practice which has taken place with respect to the countries which have, from time to time, been conquered by the crown of England, or Great-Britain, such as Ireland, Wales, Berwick upon Tweed, and Calais, and more especially the little territories of Gibraltar and

and the island of Minorca, which have been conquered from the crown of Spain, and ceded to, and enjoyed by, the crown of Great-Britain ever since the peace of Utrecht; and, Thirdly, the opinions of former judges and eminent lawyers upon this subject, testified by occasional and collateral declarations of the judges concerning it, or by the answers given by lawyers out of court to questions of law upon which they were consulted, there having been no express decision upon the point before that in the said case of Campbell and Hall. But none of these reasons appear to me to be very satisfactory.

Thirdly, the opinions of judges, given occasionally in deciding upon other subjects; and the opinions of lawyers, given out of court upon cases concerning which they were consulted.

## FRENCHMAN.

The first reason, which is derived from the king's right of making peace and war, I think I can perceive the weakness of. For why should the right of making peace and retaining a conquered country by the cession of its former sovereign upon certain conditions agreed upon with the said sovereign, intitle the new king to govern the inhabitants of such conquered country for ever after according to his single will and pleasure?

Insufficiency of the first reason.

It is more reasonable to suppose that the king's absolute power over a conquered country, being founded on necessity, should cease at the instant of the cession of the country by a peace.

pleasure? I can see no ground for such a conclusion; but should rather think that the king's absolute power over such a country (which power I will suppose to have continued during the war, from the necessity of the case;) must cease at the very instant of the cession of it by a peace, when things return from their unnatural and violent state into a state of tranquillity and civil government. And from that moment I should imagine that the conquered inhabitants, who had been permitted, and had chosen, to remain in the ceded country and take the oath of allegiance to the new sovereign, would become one people with the conquering nation, and intitled to partake of the same government with them, so as to be governed by the king, lords and commons conjointly, when that is the legislature of the conquering country, (as is the case in England,) and to become subject to the king alone in such countries only as are governed by absolute monarchs.

E N G-

## ENGLISHMAN.

I intirely agree with you in your opinion of the insufficiency of this first reason of the supposed absolute power of the Crown over conquered countries. But that you may be the better able to judge of it, I will repeat to you, as nearly as I can recollect them, the words in which it was expressed by lord Mansfield in delivering that famous judgement. It was nearly in these words. “ The king has a power to grant or refuse a capitulation to the conquered enemy. If he refuses it, and puts the inhabitants of the conquered country to the sword, or extirpates them; as he obtains the country by conquest, the lands of it are his, and he may grant them to whom he pleases : and, if he plants a colony upon them, the new settlers will hold the shares of the said lands which shall have been allotted them, subject to the prerogative of the conqueror. If, on the other hand, he does not put to the sword, or extirpate, the old inhabitants, but receives them into his obedience, and grants them a continuance

Lord Mansfield's manner of stating the aforesaid first reason.



“ nuance of their property in their own  
 “ lands, he has power to impose a tax upon  
 “ them. He is intrusted with the terms  
 “ of making peace at his discretion ; and he  
 “ may retain the conquest or yield it up on  
 “ such conditions as he shall think fit to  
 “ agree to. This is not a matter of disputed  
 “ right. It has hitherto been uncontro-  
 “ verted that the king may change a part,  
 “ or all, of the political form of govern-  
 “ ment over a conquered dominion.”

## FRENCHMAN.

Obscurity  
 and confusion  
 of the forego-  
 ing words ; in  
 which three  
 powers, quite  
 distinct in  
 their nature  
 from each  
 other, are  
 confounded  
 together.

First, the  
 power of im-  
 posing terms  
 upon the con-  
 quer'd people  
 at the time of  
 the conquest.

These words seem to be very obscure. They jumble together in a strange manner three things that are in their nature perfectly distinct ; namely, in the first place, the power of the conquering king, at the moment of the conquest, to grant or refuse a capitulation, and to put the inhabitants to the sword, or banish them from the country, and take possession of their lands, or to grant them their lives and the continuance of the possession of their lands and other property, or to grant them their lives only and deprive them of their property, or, in short, to impose

impose such terms upon them as he shall think proper; and, secondly, the power of either relinquishing the conquered country at the end of the war by a cession of it to its former sovereign, or retaining it as a permanent part of the conquering king's dominions, in consequence of a cession made of it to him by its former sovereign, (as was the case with respect to Canada and Grenada in the late war;) and *that* upon such terms of favour and indulgence to the inhabitants of such ceded country as shall be agreed on in the treaty of peace between the old and new sovereigns of it, by which it is ceded to the new sovereign; and, thirdly and lastly, the power of making laws for the inhabitants of such conquered and ceded country, and of imposing taxes upon them, after the said final cession of it to the new sovereign by the treaty of peace by which the war is concluded. These three powers are certainly distinct from each other; and it is extremely possible that the king of Great-Britain may be possessed of the two former powers by the constitution of the British government, (which, I understand, has

VOL. II. D vested

Secondly, the power of restoring the conquered country to its former sovereign by a treaty of peace, or of retaining the peaceable and permanent possession of it by means of a cession of it by the former sovereign.

Thirdly, the permanent power of making laws for its inhabitants, and imposing taxes on them, after the final cession of it by the peace.

vested in the king alone the right of making peace and war,) and yet not have a right to the last power, which can be exerted only when both the war and peace are completely terminated. And yet all the three powers seem, in those words you have mentioned of lord Mansfield, to be mingled together and considered *in the lump*, as if they were one and the same power, or necessarily connected with each other.

## ENGLISHMAN.

I agree with you in thinking that there is in those words of Lord Mansfield the confusion you have described; which is indeed surprizing in a person of such eminent abilities, and so much celebrated for his powers of reasoning. The three powers you have mentioned are certainly distinct from each other; and the possession of the first of them, or even of the first and second of them, by no means implies a right to the possession of the third. The first of these powers seems to be implied in the right of making war, which is generally acknowledged to be a part of the king of Great-Britain's

The first of the aforesaid powers seems to be implied in the power of making war.

Britain's prerogative : and the second of these powers seems to be implied in the right of making peace, which is also considered as a part of his Majesty's prerogative, though of late years it seems to have been the practice, (and it is most undoubtedly very reasonable;) for his Majesty to consult his parliament upon the terms of the intended peace, before he finally concludes it. But the third power, to wit, that of making laws for the inhabitants of the conquered and ceded country, and imposing taxes on them, after the country has been finally ceded by a treaty of peace, and is thereby become a permanent part of the dominions of the Crown, seems to have no connection with the right of making either war or peace; but, if it belongs at all to the Crown, must belong to it upon some other ground than its possession of either of those rights, and must be a part of the permanent, quiet, and (if I may so express it,) *civil prerogative* of the Crown, which it possesses independently of its military prerogative, and for the purposes of civil government only, in times of profound peace and tranquillity. I have,

And the second in the power of making peace.

But the third is not necessarily connected with either the power of making war, or the power of making peace.

But there are learned lawyers in England who ascribe this third power to the Crown, and conceive it to follow from the king's right of making war and peace.

however, heard some learned lawyers in private conversation declare it to be their opinion, that, by the law of England, the king has such a legislative power over conquered and ceded countries; and, when pressed to explain the grounds of their opinion, they have said they conceived such a power to be implied in, or to follow from, the king's right of making peace and war, and the absolute power which he acquires, or may acquire, by conquest over the lives and properties of the conquered people, if no capitulation has been granted to them to the diminution of it, either by himself or his generals who act by his authority. This kind of reasoning I have sometimes heard used by lawyers upon this subject, before the decision of the aforesaid case of Campbell and Hall: and it seems to be the same with that which is briefly and obscurely contained in those words of Lord Mansfield which we have been considering. But both then and now I have always thought it extremely inconclusive and unsatisfactory.

FRENCH-

## FRENCHMAN.

I beg you would mention, as fully and clearly as you can, the manner in which the lawyers you mention stated their argument, such as it was, and the manner in which you thought it might be answered. For, though I am already of opinion that this argument was by no means conclusive, yet I should be glad to hear the matter discussed in as full a manner as possible, as I think it a most important subject. For, in truth, I can hardly conceive a law-question that can be more curious and interesting than this of the supposed right of the crown of Great-Britain, independently of the parliament, to make laws for, and impose taxes on, the inhabitants of the countries that may be conquered by the British arms, upon which the fate and political situation of thousands, and, if we turn our eyes towards the East-Indies, even of millions, of people may depend.

The question, whether the king is, or is not, the sole legislator of all countries conquered by the British arms, is of the greatest importance.

It concerns, in the first place, the inhabitants of the conquered countries.

E N G-

## ENGLISHMAN.

And, in the second place, it concerns even the inhabitants of Great-Britain itself.

You might have added that the fate of the inhabitants of Great-Britain itself does likewise depend upon this question. For, if the king should conquer and keep possession of some of the rich provinces of Indostan, and exercise this supposed right of levying taxes upon them without the concurrence of his parliament, he might soon increase his revenue to such a degree as to be able to pay his fleet and army, and carry on the government, without the assistance of the parliament. And in such an event he might safely lay aside the use of parliaments, as their meetings depend intirely upon his pleasure, there being no law now in force that authorizes the members of either house of parliament to meet at a certain time of their own accord without the king's summons or appointment. And if this should be done, it is easy to foresee that, in a few years, the very existence of the British parliament might be forgot, or become a mere historical event, known only to the speculative

tive inquirers into the English history, just as the existence of the States-general of France (who once were sharers with the kings of that country in the exercise of the legislative authority over it,) is now known only to the lawyers and other learned men who inquire into the history of that kingdom.

### FRENCHMAN.

'This is indeed a very serious danger arising from the legislative and taxative power ascribed to the Crown by Lord Mansfield, and which I was not at first aware of, though now, that you point it out to me, I see it very plainly. And it ought, I should think, to have alarm'd all the lovers of liberty in Great-Britain. Pray, have not they expressed some apprehensions upon this subject? more especially since the decision of the case of Campbell and Hall, in which Lord Mansfield so formally delivered his opinion in favour of this dangerous power of the Crown?

ENG-



## ENGLISHMAN.

Some few Englishmen, and but a few, have express'd a sense of the dangers that may arise to them from this prerogative.

I do not hear that they have, in general, expressed any apprehensions of this kind; though some individuals among them appear to have had a just sense of this danger, and have not failed to admonish their countrymen of it. In particular I observe that the author of a pamphlet intitled, "*Considerations on the imposition of four and a half per cent. collected in Grenada, &c.*" which was published at London in the year 1774, while the aforesaid cause of Campbell and Hall was still depending, expresses himself in a very just and lively manner upon this subject. His words are as follows. "I shall  
 " leave it to abler pens to confute the pre-  
 " tension now set up of his Majesty's having  
 " a right to levy taxes in a conquered country  
 " by virtue of his prerogative royal. I always  
 " have been taught to think, that, when the  
 " British arms conquered any country, the  
 " common law of the land always was sup-  
 " posed to accompany them.—If it does  
 " not, I am sure our conquests must be  
 " fatal indeed, and, when we think we are  
 " vanquishing

An extract from a pamphlet published on this subject in the year 1774.

“ vanquishing our enemies, we are only  
 “ forging fetters for ourselves and our posterity.—If the infatuated inhabitants of  
 “ Great-Britain shall acquiesce in this claim  
 “ of power, and suffer their fellow-subjects  
 “ and countrymen in the colonies to be thus  
 “ arbitrarily taxed at the will of the king,  
 “ they will too late find, how little able they  
 “ will be to defend their own liberties, if  
 “ they should hereafter be invaded. The  
 “ great security we at present have, is the  
 “ right of being taxed only by our representatives. But, if once it is in his Majesty’s power to raise taxes on the British  
 “ dominions abroad, by virtue of his prerogative royal, that right will be rendered  
 “ very precarious. Four and an half per cent.  
 “ on the produce of Bengal alone, would  
 “ amount to a sufficient sum, without grant  
 “ of parliament, to pay and maintain armies,  
 “ by whose assistance, *if any future king*  
 “ *should think fit*, neither the representatives  
 “ nor the people would have any thing left  
 “ to grant.” To the truth of these sentiments, I must confess, I most cordially subscribe.

## FRENCHMAN.

Expediency of  
passing an act  
of parliament  
for settling the  
legislative  
power over  
conquered  
countries in  
the king and  
parliament  
conjointly.

And so do I. And so ought every British subject to do. And indeed I should think it natural for the parliament of Great-Britain itself to take the matter up before it is too late, and to pass a bill, either to declare the law upon this subject to be directly contrary to what Lord Mansfield has represented it, if they think that learned lord's opinion to be erroneous, or, if they think the law, as it now stands, to be agreeable to his opinion, to change it for the future, and to vest the right of imposing taxes on, and making laws for, the inhabitants of all countries that shall be hereafter conquered by, or ceded to, the Crown of Great-Britain, in the king and parliament conjointly.

## ENGLISHMAN.

There is but  
little reason to  
expect that  
such an act of  
parliament  
will be passed  
in England.

I heartily wish that such an act of parliament were to pass, though, by all the accounts I have heard of the present state of England, I have little expectation that any such thing will be so much as attempted. So low is the spirit of liberty at present  
amongst

amongst the English nobility and upper gentry! and so much are they sunk in pleasure and dissipation of the most wild and extravagant kind, such as gaming to a degree that was not heard of twenty years ago; by which it happens, not only that many of them, in the course of a few years, run out the most ample fortunes, and bring themselves into circumstances of distress that render them dependant on the crown for a support, but that they lose the very taste for liberty, and that habit of serious reflection upon important subjects, which is necessary to make them rightly understand, and duly estimate, the advantages of a free government! At least this is the account which has been transmitted of them to us, inhabitants of North-America; and it has greatly contributed to dispose the greater part of us against any close connection with, and, still more, against a subjection to, a parliament composed of such members.

The love of liberty is less strong amongst the English than it used to be.

This circumstance has made the Americans unwilling to be connected with the British parliament.

But, if the present temper of the people of Great-Britain should take a turn, (as sometimes happens most unaccountably,) and should become again favourable to publick

E 2

liberty,

There is another point of importance relating to conquered countries, which ought likewise to be settled by act of parliament in a manner that may be consistent with publick liberty.

liberty, and an act of parliament of the kind you have mentioned, for vesting the legislative authority over conquered countries in the king and parliament conjointly, should be then proposed, I should wish that another point, of almost as much consequence to publick liberty as this legislative power, should be settled at the same time in such a manner as would be compatible with the continuance of that invaluable blessing.

### FRENCHMAN.

Pray, what may that other point be? For I may truly say that, (though I was born in Canada and under the dominion of an absolute monarch,) I have as great a relish and value for civil liberty as any of you, natives of Great-Britain or the antient British colonies in America, though I may not be so well acquainted with the proper means of acquiring or preserving it. And the same may be said of a great many other Canadians. The ease and freedom we have enjoyed under the English government for these fifteen years past, till the fatal 1st of May last, when the new act relating to the government of this province

province took place, has given us such an agreeable taste of the pleasures of English liberty as will not soon be obliterated from our memories, though we should now be again reduced to our former state of servitude. And our former, and, (as we have reason now to apprehend,) our future, experience of this latter unfortunate situation, will probably only heighten our relish of the happier condition we once enjoyed under the compleat protection of the English laws and constitution. I therefore beg you would inform me, what that other point is, which you consider as being of nearly the same importance to the preservation of publick liberty in Great-Britain as the vesting the legislative power over the inhabitants of conquered and ceded countries in the king and parliament conjointly.

## ENGLISHMAN.

That other point is the right which the king of Great-Britain is by many people supposed to

have taxes in conquered countries as are legally existing in them at the time of the conquest.

That point is the right of the king to such publick revenues and

Two opinions  
are entertain-  
ed upon this  
subject.

have (as the law now stands) to collect from the inhabitants of a conquered and ceded country all the publick taxes which are already legally established in such country at the time of the conquest, and to dispose of them, when collected, in whatever manner he shall think fit: which, you cannot but observe, is quite a distinct right from that of imposing new taxes on the inhabitants of such countries. This prerogative is not indeed universally allowed to belong to the crown in the extent I have mentioned; there being some gentlemen of great judgement and extensive knowledge in the laws and history of England who are of opinion that the right of *disposing of* the revenues of such conquered countries, when collected, does not belong to the king alone, but to the king and parliament conjointly, though they allow that the right of *collecting them* belongs to the king alone. But other persons, (and, I am inclined to think, they are more in number than the former,) are of opinion that the king may legally do both these things, laying it down as a general maxim in the English government, " That  
the

the king (though he cannot levy money upon his subjects without consent of parliament,) may dispose of all publick money already levied, and of the continual produce of all taxes already legally existing, in any manner that he shall think proper; except where such money shall have been appropriated, by act of parliament, to certain specified publick uses, or reserved by the same authority for the future disposition of parliament." \*

Which of these two opinions deserves to be considered as the true one, is more than I will pretend to determine. But, as I just now observed, the latter, (which gives the king the right of disposing of the publick revenues of conquered and ceded countries, as well as that of collecting them,) seems to be the most generally adopted. Now, if this latter  
 opinion

\* According to both these opinions the king might legally collect the poll-tax in the island of Grenada which was paid in the time of the French government. And accordingly I do not find that any action has been brought against the collectors of the said poll-tax, as having collected it illegally.



The right ascribed to the crown by the latter of the two foregoing opinions, (though it may legally belong to the crown) may, in some cases, be very dangerous to the liberties of Great Britain.

opinion be true, it is certain that this right of the crown to collect and dispose of the publick revenues of conquered countries may become extremely dangerous to the liberty of the inhabitants of Great-Britain; as will easily appear by supposing a case in which an ample annual revenue should accrue by virtue of it to the crown. The wealth of the large provinces of Indostan, and their weak, unwarlike, and disunited, state will enable us to imagine such a case without transgressing the bounds of probability.

Case of the conquest of certain provinces of East-India.

We have seen that the rich provinces of Bengal, Bahar, and Orixia, in that great peninsula, have already, in effect, been reduced to a state of obedience to the East-India company, though they continue, nominally, to be governed by one of their own natives, who is permitted to call himself their nabob, or sovereign. The publick revenue collected in these three provinces is generally allowed to be three millions, six hundred thousand pounds, sterling. This revenue was collected there in the time of the independant

dependant nabobs, or soveraigns, of those provinces: and therefore, I presume, the taxes, or rents, out of which it arises, were imposed upon the inhabitants of them by what was then considered as the legal authority by which those provinces were governed. This revenue has, for these eight, or nine, years past, been received by the East-India company; who have been invested with the office of *Dewan*, or publick treasurer, of those provinces: and they allow a small portion of it (two, or three, hundred thousand pounds a year,) to the nominal, or dependant, Nabob, whom they have permitted, or, rather, appointed, to govern those provinces under their protection; and they employ another part of it in the maintenance of their own armies, and forts, and other establishments, civil and military, in that country; and then they divide the remainder of it (over and above what is necessary for these purposes,) amongst themselves, that is, amongst the several proprietors of East-India stock. Now let us suppose that another such conquest should be made in that

VOL. II.

F

country

country by the crown instead of the East-India Company; as for example, a conquest of the province of *Arcot* (of which we have lately heard a great deal;) or of the province of *Decan*: and that the publick revenues regularly collected in the country so conquered should amount to three, or four, millions of pounds sterling *per annum*. Of this large revenue it is probable that, with good management, one or two millions might be sufficient to defray the expences of the civil and military establishments that would be found necessary for the maintenance of the king's authority and the administration of government in the said country; and consequently that two millions of pounds sterling might be remitted every year to England, to be disposed of as the king should please. There is nothing in this supposition that is at all improbable; nor would the making such a new conquest, and the acquisition of such a new revenue, by the Crown be at all inconsistent with the rights of the East-India Company, or their enjoyment of the acquisitions they have already made of the provinces of Bengal, Bahar, and Orix.

The Crown might, probably, derive from such a conquest, (without imposing any new taxes,) a clear revenue of two millions of pounds sterling *per ann.*

Oriza. Now, with such an annual increase of the royal revenue, the Crown might either govern the British nation without the assistance of parliament, (as king Charles the 1st did during the space of eleven years, till the people had almost forgot what a parliament was;) or, (which would be a milder and safer way of proceeding,) it might so influence the elections of members of the House of Commons as to cause a great majority of them to be chosen out of such persons as the ministers of state should have recommended for that purpose; or, if those members had been chosen freely, it might influence them, when chosen, to pass such bills, and give their sanction to such measures, (whatever their tendency might be,) as the Crown should think fit to adopt. In either of these three ways it is evident the freedom and excellence of the British constitution would be greatly impaired, and, in the first way, totally extinguished. You now see the danger that may arise from this other prerogative of the Crown, "to dispose of the revenues already legally existing in conquered and ceded countries in such manner as it shall

Ill consequences to publick liberty that might arise from such an increase of the revenue of the Crown.

“ think fit,” which is much more generally allowed to belong to the Crown than the former prerogative of imposing laws and taxes on the inhabitants of such countries.

### FRENCHMAN.

You have made it very plain to me that this prerogative may become exceeding dangerous to Great-Britain; and therefore I join with you most heartily in wishing it were put under some regulation, or restraint, that would remove this danger. But, pray, in what manner would you propose to regulate this dangerous prerogative? For I do not think it would be easy so to regulate it as intirely to remove the danger you have been describing.

Difficulty of  
regulating  
this prerogative  
of the  
Crown.

### ENGLISHMAN.

I agree with you that it cannot easily be regulated so as to avoid those dangerous consequences we have been speaking of. Nay more, I believe it cannot possibly be so regulated. And therefore (as we now are speculating upon this subject, and inquiring,

ing, not what is most likely to happen, but what is best,) I do not wish it to be regulated, but to be wholly given up by the crown and vested, by act of parliament, in the king and parliament conjointly, “ so that, for the “ future, the publick revenues of all such “ countries as shall be conquered by the British arms and ceded to the crown of Great-Britain, which shall be found to be legally “ existing in the said countries at the time of “ the conquest and cession of them, should be “ disposed of by act of parliament only;” like the overplus of the taxes granted by parliament in Great-Britain itself, above the sums necessary to defray the expences of the services for which they are granted, which overplus, I am assured, is always reserved, by special clauses in the acts by which those taxes are granted, for the future disposal of parliament.

Expediency of  
totally abolishing  
it by  
act of parliament.

#### FRENCHMAN.

This would undoubtedly be a most desirable method of preventing the dangers we have been speaking of. But, as it would so greatly diminish his Majesty's personal emoluments from all future acquisitions of his crown,

crown, it seems hardly reasonable to expect that he should consent to it : and without such consent, I presume it cannot be taken.

## ENGLISHMAN.

There is reason to think that his present Majesty would generously assent to such an act of parliament, if he were requested by his parliament, or advised by his ministers, to do so.

It certainly cannot. But there is reason to think that, if his Majesty were to be solicited by his parliament to give his assent to a bill of this kind, or even if he were to be strongly advised by his ministers of state to declare to his parliament before-hand his disposition to assent to such a bill, (which would be a more decent and proper way of conducting the business than the other,) he would graciously condescend to sacrifice his own personal interest to the safety and satisfaction of his people. For he has already vouchsafed to do a similar act of noble generosity towards his subjects, in giving up to the publick revenue of Great-Britain the sum of seven hundred thousand pounds sterling, which was the produce of the sales of the French ships which had been taken by the late king's ships of war in the years 1755 and 1756, in the beginning of the hostilities of the late war

This may be inferred from a similar act of generosity performed by his Majesty since the last peace, with respect to the money produced by the sale of the French prizes taken before the declaration of war.

war against France, and before the war had been declared in form, and the usual act of parliament had been passed for vesting the property of the ships and goods, that should be taken at sea in the course of the war, in the officers and sailors of the vessels by which they should be taken. After such an act of generosity one can hardly doubt of his Majesty's willingness to consent to such an act of parliament as I have mentioned, if he were to be advised to such a measure by his parliament or by the ministers of state whom he honours with his confidence.

#### FRENCHMAN.

The instance you have mentioned of his Majesty's generosity to his subjects in giving up to them the said sum of seven hundred thousand pounds sterling, is indeed a very noble one, and warrants you in the opinion you entertain that he would not refuse his royal assent to an act of parliament of the kind you have suggested, if it were properly recommended to him. The probability therefore of such an act's being passed will depend upon the disposition of the parliament to  
request,



It would be beneficial to the nation to purchase his Majesty's consent to such a measure by a grant of a handsome sum of money.

request, or of his Majesty's ministers of state, to advise, his Majesty to agree to such a measure. How far they are likely to solicit or recommend such a measure, I know not : but to me it appears to be a matter of so much importance that I should think it a good bargain for the British nation to purchase his Majesty's resignation of this prerogative at the expence of half a million, or even a million, of pounds sterling, which, (as the emoluments which his Majesty might derive from this prerogative are distant and uncertain,) might, I should imagine, be thought no contemptible compensation for the loss of it. And thus both the king and his subjects would reap benefit from such a measure.

### ENGLISHMAN.

I have no objection to purchasing so great a security for the national liberties for what the lawyers call *a valuable consideration* ; more especially as it would give the resignation of this prerogative on the part of the Crown the greater appearance of freedom and perfect approbation, and would thereby contribute

contribute to make it more binding and permanent. Nor do I think the greater of the sums you have mentioned too great a price for so important an advantage.—But now, if you please, we will go back to the subject we were before considering, when this inquiry concerning the danger arising from the king's right to the legally-existing revenues of conquered countries; called us away; that is, to the right of making new laws for, and imposing new taxes on, the inhabitants of such countries; which right Lord Mansfield has declared to be vested, by the English constitution, in the king alone, without the concurrence of his parliament.

## FRENCHMAN

You were saying, if I remember right, that you had known some private lawyers who, (before the decision of the case of Campbell and Hall,) had declared it to be their opinion that, by the law of England, the king has such a legislative power over conquered and ceded countries; and that, when pressed to explain the grounds of their opinion, these lawyers had said that they

VOL. II.

G

conceived

conceived such a power to be implied in, or to follow from, the king's right of making peace and war, and the absolute power which he acquires by conquest over the lives and properties of the conquered people, when no capitulation has been granted to them, either by the king himself or the generals who act by his authority, whereby the said power has been diminished: which reasoning seemed to be much the same with that which is briefly and obscurely contained in those words of Lord Mansfield, which you had cited from the judgement he had delivered in the court of King's-Bench upon the aforesaid case of Campbell and Hall. Now I should be glad to hear, in as full a manner as you are able to state it, the whole argument of these lawyers, such as it was, and the answers that you thought might be given to it.

### ENGLISHMAN.

An argument used by some private English lawyers in support of the king's absolute legislative authority over conquered countries.

The principal argument, alledged by those lawyers in support of this supposed prerogative of the Crown, may be stated in the following manner. "This king, say they, without the parliament, is, by the English constitution,

" constitution, invested with the power of  
 " making peace and war, and intitled to the  
 " absolute property of all the captures made  
 " in war, which he has previously divested  
 " himself of his right to such property by  
 " some voluntary act of his own, as, for  
 " example, by giving his royal assent to  
 " some act of parliament made in favour of  
 " the officers and soldiers, or sailors, by  
 " whom the said captures shall be made.  
 " He is master of the lives of all prisoners  
 " of war who are taken without a capitulation: ~~and~~ He is absolute master of all  
 " the ships, and money, and merchandize,  
 " or other plunder; his troops and ships get  
 " possession of, and may dispose of them in  
 " what manner he thinks fit. And, if he  
 " thus becomes absolute master of all the  
 " moveable property he can seize, (which  
 " is clear beyond a doubt,) then also, by  
 " parity of reason, say these lawyers, he  
 " must become master likewise of all the  
 " immoveable property he can take from  
 " his enemies, that is, of all the lands and  
 " houses of the countries his armies con-  
 " quer; so that, if the country surrendered

" at discretion and; without a capitulation,  
 " he might, by right of conquest, lawfully  
 " dispossess every freeholder in the country  
 " of his land, and give it away to other  
 " persons, or sell it to the highest bidder,  
 " and apply the money thence arising to  
 " whatever uses he thought fit. He is there-  
 " fore, say they, absolute monarch of the  
 " country, since the lives and fortunes of  
 " the inhabitants are thus intirely at his dis-  
 " posal."

This is the strongest way I know of stating  
 this argument of these lawyers; in answer to  
 which we may make the following remarks.

An answer to  
 the said argu-  
 ment.

All the premisses in this argument I allow  
 to be true; but do not think that the con-  
 clusion, which these gentlemen would draw  
 from them, is just, namely, that the king is,  
 therefore, the absolute monarch of such a  
 country, or has, in his single capacity, the  
 right of making laws for it. The power  
 over the lives of the conquered people is  
 certainly only a temporary power. If the  
 king does not cause them to be put to death  
 immediately

immediately after they are taken, or, at least, during the remaining part of the war, he loses his right of doing it. For, when a peace is made, and the conquered country is ceded and transferred to the conqueror by the former sovereign, and the old, or conquered, inhabitants are suffered to continue in the country, and admitted to the rank of subjects, and to take the oath of allegiance, it seems clear that they have a right to be protected in their persons and future property, acquired after the peace, in the same manner as the other subjects of the conqueror: That is, in other words, after the peace is made, the grand preliminary proposition upon which the above-mentioned lawyers grounded their argument, to wit, "that the king is the absolute master of the lives and fortunes of the conquered people," is no longer true; and consequently the conclusion they draw from it, "that therefore the king was the absolute monarch and legislator of the country," will not follow from it.

The

Of the original  
foundations of  
the rights of  
war.

The fallhood of this preliminary proposition, when extended beyond the conclusion of the peace and the final cession of the country, will be further evident by considering the original foundations of the rights of war. Now these rights of war over the persons and property of a conquered people, are evidently only temporary rights, founded on necessity, in order to enable the conqueror to preserve the advantages he has gained in the war, and compel the enemy to accept of a reasonable peace: and, therefore, they can subsist no longer than the necessity that gives rise to them, that is, no longer than the war continues.—And, as the rights of war themselves are founded on necessity, so the power, or prerogative of exercising those rights, that is, the prerogative of managing the war, is vested, by the laws of England, in the king alone for almost the same reason, namely, on account of the high expediency, amounting to a kind of necessity, of entrusting this matter to the direction of one man, arising from the extreme difficulty of carrying on the operations of the war, and of making the sudden and temporary regulations fit

The probable  
foundation, or  
reason, of the  
king's prerogative of conducting the operations of war by his single authority.

to be observed in conquered countries immediately upon their first submission, by a numerous body of men, and who are not at all times assembled together, such as the parliament of Great Britain. This is conclusive to be the reason why the power of making these regulations is vested in the king alone immediately upon the conquest of a country and during the remainder of the war: during all which time the inhabitants of such a country, though no longer in arms against their conquerour, must still be supposed to be secretly his enemies, and to be inclined to take the first opportunity of throwing off his authority and returning to their former masters, and are, in truth, no other more nor less than prisoners of war who are permitted to be at large upon their parole of honour. While this violent state of things continues, the king continues to have the sole power of governing the conquered country and its inhabitants, and consequently that of making temporary laws for them according to his discretion, as being a necessary part of such government. But, when the peace is made, and the country is ceded for

ever



This reason ceases to exist, when the peace is concluded, and the conquered country has been ceded by its former sovereign to the Crown of Great-Britain.

ever to the crown of Great-Britain by the former sovereign of it, and the old inhabitants of the country are permitted to continue in it as subjects to the conquering sovereign, and to take the oath of allegiance to him, (either with or without a restoration of their lands to them,) there seems to me to be an end of the exercise of the king's prerogative of making war in such a country, and of all the incidental powers belonging to such prerogative. From that moment the laws of peace take place, and, as I should conceive, the legislative authority with respect to such new part of the British dominions as well as with respect to the former parts of them, must revert to its proper channel, in which it runs in times of tranquillity, that is, to the king and the two houses of parliament conjointly. And, if it does not then so revert, it must be owing to some other cause, or reason, than the king's having the sole prerogative of making war and peace, because at this time both the war and the peace are supposed to be completely terminated.

FRENCH

## FRENCHMAN.

I am thoroughly convinced, or rather confirmed in my former opinion, that this legislative power of the Crown over conquered and ceded countries can never be derived from the royal prerogative of making war and peace, whatever other foundation it may have in the laws or constitution of Great-Britain. But was this argument, (derived from the prerogative of making war and peace,) the only argument by which the lawyers you conversed with, endeavoured to maintain their opinion of the legislative authority of the Crown over conquered countries? Did they alledge no circumstance in support of it, that continued to have an existence after the conclusion of the peace and the final cession of the conquered territory, when the legislative power in question was supposed by them still to continue in the Crown?

Of other arguments alledged by the aforesaid English lawyers in support of the king's legislative power over conquered countries.

## ENGLISHMAN.

They were very indistinct in their manner of stating the grounds of their opinion. They partly asserted this legislative power to belong to the Crown as a sort of known proposition, or maxim of law, and partly endeavoured to prove it; and it was not very easy to distinguish their assertions from their proofs, or to discern in what their proofs consisted; which must often be the case when the proofs alledged in support of a proposition are in themselves weak and inconclusive. Their first and best argument (bad as we think it,) was that which I have already stated to you, which is grounded upon the king's prerogative of making war and peace. But they did also seem to found another argument upon the king's becoming owner of all the lands of the country he had conquered, and having a power to grant them either to the old inhabitants, who had possessed them under the former government, or to any other persons, and upon such terms and conditions as he should think proper; from

An argument for this purpose derived from the king's becoming owner of all the lands of the countries he conquers.

from which they seemed to infer that he had likewise a right to make what laws for them, and impose what taxes upon them, he should think fit. And something of this kind, you may observe, seems to be hinted at in the words of Lord Mansfield above-mentioned, where he says, "That the lands of the country are the king's, and he may grant them to whom he pleases; and, if he plants a colony upon them, the new settlers will hold the shares of the said lands which shall have been allotted to them, subject to the prerogative of the conqueror."

Lord Mansfield's words to this effect.

These words seem to me to mean, that the king's legislative authority over these new settlers is derived from the circumstance of his having granted them their lands; though still the last words, *subject to the prerogative of the conqueror*, seem very obscure, since the whole matter in question is to know *what is the prerogative of the conqueror*. However, some kind of right of legislation in the Crown seems intended by these words to be derived from the king's having been the original owner of the lands immediately upon the

H 2                      conquest,

conquest, and having granted them to their present possessors upon such conditions as he thought fit.

## FRENCHMAN.

A remark on the foregoing argument, shewing its insufficiency.

This seems to me a strange way of arguing; to found a right of imposing laws and taxes on the inhabitants of a given district, on the mere ownership of the lands, or rather on the circumstance of having once owned them and afterwards granted them away.. It is true indeed that the owner of any lands, (whether he be a king or a private person,) may annex what conditions he pleases to the grants that he makes of any parcels of them, so far as such conditions are not contrary to the general laws of the country to which the lands belong; he may grant them to be holden only at his will and pleasure, (though such a slight transmission of them would hardly deserve to be called *a grant*;) or he may grant them for a term of years, or for the life of the grantee, or for several lives, or to the grantee and his heirs for ever. And he may require either a small, or a very heavy, annual rent to be paid

paid for them, as he and his grantees shall agree. But, when once the grant is made, his power, as owner of the land, seems to me to be at an end, and he will have no right to impose any new rents or conditions on them ever after, provided they pay the rents and perform the conditions that have been originally agreed on. There is nothing therefore in this circumstance of the king's being owner of all the lands of a conquered country, immediately after the conquest of it, that can give him the least shadow of a right to impose laws or taxes on the inhabitants of it, whatever other grounds there may be for such a power. Not to mention that it hardly ever happens, in modern times, that the conqueror of any country belonging to one of the civilized states of Europe becomes the owner of all the lands of it even for an instant, it being almost the constant practice, in such conquests, to grant to the inhabitants of the conquered country the quiet possession of their lands immediately upon their submission to the conqueror. And this, we have seen in particular, was done in the case of the island of Grenada, where all the inhabitants who held  
lands

lands in it, were continued in the enjoyment of them by the articles of the capitulation and the peace : so that no such pretence to a legislative power derived from the original ownership of the land, (weak as it is,) can be applied to that island. But indeed this argument for the legislative power of the Crown over conquered countries, which is grounded on the original ownership of the lands of them, is too weak to need a confutation.

### ENGLISHMAN.

I think of it in the same manner as you do, and was therefore half-inclined to pass it over and say nothing to you about it, if you had not pressed me so earnestly to inform you of every other argument that had been alledged by the lawyers I had conversed with in support of this legislative power of the Crown. However, since we *have* touched upon it, I will mention an additional observation or two that have occurred to me concerning it, over and above the remarks which you have made on it, to which I intirely subscribe.

The

The idea of deriving the legislative power of the Crown over a conquered country from its original ownership of the lands of the country immediately after the conquest, (though that effect of conquest does not, as you rightly observed, happen once in a hundred years in the wars between civilized nations, but is prevented by capitulations;) seems to have arisen from a want of attention to the true nature of legislative power. The legislative power over a civil society is not a sudden and temporary power, which is to be exercised once for all, and then to cease and be extinguished, but is an authority constantly in being, and incapable of any restriction, because it is founded on the power of the whole society, who are supposed to have delegated to a particular man, or body of men, the power, originally inherent in themselves, of making new laws to bind the whole society, whenever they shall think it necessary. This is a very different thing from the power of an owner of lands with respect to the persons to whom he means to grant them, arising from that ownership, even supposing that it were lawful for

Another remark to the same effect.

Of the nature and foundation of legislative power over a civil society.

Difference between this power and the power of an owner of lands over the persons to whom he grants them.



for such owner to require of his grantees, as a necessary condition of their enjoying the lands he was about to grant them, that they should be governed by such a particular system of laws which he had appointed for them. For by such a condition, if it were lawful for the original owner of lands to annex such a condition to his grants, (which it is not in most cases,) he would only become a *temporary* legislator, with a power to introduce that original system of laws. But he could not afterwards make any alteration in those laws, or any new law to bind his grantees, or impose any new tax upon them, over and above the rents originally reserved in his grants, by virtue of such former ownership; because every such new law and tax would be a breach of his own grants, which are the only foundation of his authority. This power, therefore, of imposing the original system of laws by which his grantees were to be governed, as a condition of the tenure of their lands, (if such a condition could be legally required of them,) would be only a temporary legislative power, which might be executed once,  
for

for all, at the time of making the grants ; but then must cease and be extinct for ever ; which cannot happen to the true and genuine legislative authority over a society, which is, as I before observed, a permanent authority, and incapable of dissolution, so long as the society, which is the object of it, continues to be a civil society. Now it is by confounding the temporary power of a granter of lands, arising from his power of prescribing the conditions on which he will make grants of them, with the permanent power of a regular and genuine legislator, that, as I conjecture, the lawyers I conversed with were induced to ground, on the circumstance of the king's original ownership of the lands of conquered countries, immediately after the conquest of them, their opinion that he was the constant and regular legislator of them.

#### FRENCHMAN.

That seems to be the most natural way of accounting for their manner of reasoning ; which, after all, appears to me to be surprizingly weak and inconclusive. For who could ever have thought of deriving a right

VOL. II.

I

of

Abſurd confe-  
quences that  
would reſult  
from a ſuppo-  
ſition that the  
ownership of  
lands could  
give the own-  
er of them a  
legiſlative au-  
thority over  
the perſons  
who inhabit  
them.

of making laws from the circumſtance of being a great land-owner? At this rate every rich man in England, who is poſſeſſed of a large tract of land which is occupied by his tenants, might not only introduce a new ſyſtem of laws among them by requiring them to promiſe obedience to ſuch laws as a condition of the leaſes he was willing to make them of a part of it, but might alſo, after the leaſes were made to them, change thoſe laws for another ſyſtem, and double the rents he had reſerved in their leaſes by impoſing a tax upon them. Nothing, ſurely, can be more extravagant than ſuch an opinion.

### ENGLISHMAN.

The extravagance of it is ſo ſtriking in the caſe, which you ſuppoſe, of a private perſon, that I believe no man could, for an inſtant, be perſuaded to entertain ſuch an opinion. And yet, if the mere ownership of the land could create a legiſlative authority over the perſons who inhabit it, it muſt be confeſſed that ſuch a concluſion might juſtly be inferred from it. But in the caſe of a king people are apt to think the reaſoning leſs abſurd.

The

The splendour of majesty dazzles their imagination and overpowers their understanding. And yet, I presume, there are few positions in the law of England more certain than this, " That, if any county in England, as, for instance, Yorkshire, (which is the largest county in the kingdom) was, by purchases, and escheats and forfeitures for high-treason, and other lawful methods, to become the sole property of the king, his Majesty would not thereby acquire one jot more legislative power over the inhabitants of such country, in consequence of such sole and full possession of it, than he has at present; but the same laws would take place in it after such transfer of the property of the lands to the Crown as did before, and they would be liable to be changed, or altered, only by the same legislature as before; that is, by the king and parliament of Great-Britain conjointly, but not by the king alone. Nor would the king acquire, by such a property in the whole county, even the imperfect and temporary legislative power above-mentioned, or the right of imposing a new system of laws upon the inhabitants of it once for all, as a con-

The king, by becoming owner of all the lands of any particular county in England, would not thereby acquire any power of making laws by his single authority for the inhabitants of it.

dition annexed to the grants of land he might be willing to make them in it; but he must either not make any grants of land in it at all, or he must make them upon the usual and known conditions upon which, by the laws already in force, lands may be granted in England. And every condition, annexed to a grant of land, that should not be agreeable to those laws, would either make the whole grant void, or, at least, be void itself. Thus, for example, if the king were to grant a parcel of land in such county to a man and his heirs for ever, with a condition, that neither he nor any of his heirs should ever sell it, or give it away from the next right heir, and that, if he should attempt to make any such alienation of it, the grant should become void, and the land should revert to the right heir of the grantor immediately upon the taking of the first necessary step towards such an alienation, and before the alienation is compleat; that condition of the grant would be void, because it would tend to create a perpetual estate indefeasibly vested in the same family, or line of descent, which is a thing the laws do not allow. In the same manner, if the  
king

king were to grant a parcel of land in the said county, (of which he had by divers accidents become the sole proprietor,) and to annex to his grant any other condition that was contrary to the general laws of England, as, for instance, a condition that the youngest son should inherit the land instead of the eldest, or the eldest daughter instead of the eldest son, such a condition would be a void condition. And still more certain it is, that, if the king were to grant such whole county, (of which he was become the sole proprietor) in several parcels, to a set of new grantees, with a condition that they should be governed by the laws of Hanover, or the custom of Paris, instead of the laws of England, the said condition would be void, and the grantees would be bound to obey the laws of England.

- This restraint upon the power of the Crown with respect to granting lands in the case I have here supposed, does not, indeed, arise from any right, or privilege, of the grantees themselves; who, naturally, ought to be bound by every condition to which they have freely consented; but it arises collaterally from

The true ground of the restraint under which the Crown would lie in such a case.

from the interest that the other subjects of the Crown have, that no unreasonable, or inconvenient, laws, or customs, should take place in any part of the dominions that are subject to the same sovereign with themselves, and which by means of the necessary connection between the several parts of one and the same kingdom, or empire, might ultimately be prejudicial to themselves.

The Crown, therefore, would not, in the case I have supposed, have even the temporary power of legislation above-mentioned, or the right of requiring the new grantees of the lands of the county of which it had acquired the sole property, to observe any particular system of laws different from the laws of England, as a condition of the tenure of their lands: much less would it thereby become possessed of the constant, or permanent, right of making laws and imposing taxes on its inhabitants, which alone deserves the name of *the legislative authority*, and which is the authority ascribed to the Crown in the island of Grenada by Lord Mansfield, before the issuing of the proclamation

mation of October, 1763, by which the Crown relinquished it.

But we have dwelt too long on this whimsical argument for deriving the king's legislative authority over conquered countries from an original ownership of the lands of them, since, for the most part, no such ownership ever exists even for an hour, but the inhabitants are permitted to retain their lands by the terms of the capitulations, as was the case with Grenada in the late war, and with all the other islands then taken from the French king in the West-Indies.

### FRENCHMAN.

I think indeed we have had enough of this argument. But, if these are all the arguments that are to be derived from reason and general principles in support of the king's legislative authority over conquered countries, I must needs think it requires other grounds than reason and general principles to support it. But, perhaps, there may be precedents, or other arguments from authority, to be alledged in favour of it: and,

It must further be observed that, in almost all the conquests made by the Crown of Great-Britain in modern times, the king is precluded from becoming owner of all the lands of the conquered countries by previous capitulations permitting the inhabitants to keep their lands.

End of the consideration of the arguments derived from reason and general principles in support of the king's legislative authority over conquered countries.

Of precedents and other arguments from authority in favour of such

a legislative power in the Crown.



if I remember right, you, some time ago, said that Lord Mansfield, in delivering the judgement of the Court of King's-Bench in that case of Campbell and Hall, mentioned some such arguments. I therefore beg you would state them to me, if it is not too much trouble.

### ENGLISHMAN.

Lord Mansfield did mention two arguments of the kind you mention, the one derived from the history of the countries conquered by the crown of England or Great-Britain, the other from the opinions of English judges and other lawyers of eminence occasionally given upon this subject, though without any formal decision of the point by any court of justice in the determination of a cause which turned upon it.

### FRENCHMAN.

Of the arguments from history in favour of this legislative power of the Crown.

Pray, let me hear what were the arguments from history in favour of this legislative authority of the Crown. For, if these are clear and positive and uniform, I should think they must have more weight than any other.

ENG.

## ENGLISHMAN.

They certainly would deserve great regard, if they had the qualities you mention. But, as they are, the greater part of them appear to me to be intitled to very little. The instances mentioned by Lord Mansfield of countries conquered by the crown of England before the Union, and of Great-Britain since that happy period, were those of Ireland, Wales, Berwick upon Tweed, Calais, Gascony, New-York, Gibraltar and Minorca.

Concerning Ireland his words are as follows. " The alteration of the laws of Ireland has been much discussed by lawyers and writers of great fame. No man ever said the change was made by the parliament. No man, unless perhaps Mr. Molyneux, ever said the king could not do it. The fact, in truth, after all the researches that could be made, comes out clearly to be as laid down by Lord Chief Justice Vaughan; namely, That " Ireland received the laws of " England by the charters and command of " king Henry the 2d, king John, Henry

VOL. II. K " the

Lord Mansfield's assertions concerning the legislative power exercised over Ireland.

“ the 3d, &c.; which &c. is added by Lord  
 “ Chief Justice Vaughan in order to take in  
 “ Edward the 1st and the other successors  
 “ of the princes he had named. That the  
 “ charter of the 12th year of king John’s  
 “ reign was by assent of parliament in Ire-  
 “ land, Lord Chief Justice Vaughan shews  
 “ clearly to be a mistake. Whenever a par-  
 “ liament was called in Ireland, that change  
 “ in their constitution was without an act of  
 “ parliament in England, and therefore  
 “ must have been derived from the king.”

Remarks on  
them.

This is all that is said by Lord Mansfield  
 concerning Ireland; which at most proves  
 that, five hundred years ago, the kings of  
 England, upon the conquest of Ireland,  
 exercised one species of legislation over it,  
 to wit, that of abolishing the Irish laws and  
 introducing the laws of England in their  
 stead. But it does not prove that they be-  
 came the permanent and general legislators  
 of Ireland, and made and unmade laws there,  
 and imposed taxes upon the inhabitants, at  
 their pleasure, without the concurrence of  
 either the English or Irish parliament; which  
 was

was the legislative power supposed by Lord Mansfield, (if I understand him right,) to belong to the king in the island of Grenada, before he had divested himself of it by his proclamation of October, 1763. Now, as to this one species of legislation, that of introducing the laws of England into the conquered country, as it no way lessens the rights and privileges of the English, or conquering nation, nor tends to give the king new and dangerous powers which may hereafter be used to their prejudice, but rather tends to confirm them in their enjoyment of those rights and privileges, by extending them to their new fellow-subjects, the inhabitants of the newly-conquered country, it may well be presumed to have the approbation of the conquering nation, though done without an express concurrence of their parliament. It can therefore be no ground for the exercise of a permanent and general legislative authority by the Crown alone over the conquered people in other instances; as, in raising taxes upon them; establishing a religion amongst them; compelling them to serve as soldiers in regular armies otherwise

K 2

than

than for the defence of their own country; altering the mode of administering justice amongst them, so as to make it different from that of the English, or conquering, nation, as well as from that which took place before the conquest of the country; introducing, or abrogating, amongst them the custom of having slaves; altering the laws of tenure, or of inheritance; or the age of majority or discretion; or the privileges of marriage; or the legitimacy, or illegitimacy, of children in certain cases; or the powers of parents over their children; or the power of entailing estates, or of freeing them from entails; and settling all these matters in a manner not known to the laws of England; and of making other, the like, changes in the civil condition of the conquered people. All these acts appear to me to be acts of legislation of a very different kind from that of introducing the laws of England into the conquered country. The former are the acts of a real and general legislator: the latter may reasonably be considered as an act of the executive power, by which the king, acting as the great executive magistrate of the English

lish nation, executes their presumed intention by extending the operation of those laws which have already received the sanction of their approbation. And for this reason this instance of Ireland appears to me to have but little weight with respect to the purpose for which it is adduced, that of proving that the king had a right to make laws for, and impose taxes on, the inhabitants of Grenada before the proclamation of October, 1763.

But, besides this objection to the above argument drawn from Ireland, we may observe that great alterations have happened in the constitution of the English government since the days of king John, and, for the most part, in favour of the liberty of the subject, and to the diminution of the power of the crown: so that I can allow but little weight to a precedent, in favour of a doubtful prerogative of the crown, drawn from those antient and obscure times, unless it has been followed by others of the same kind in more modern times, which are better known and bear more resemblance to the present. Now, if we pursue the history of  
Ireland,

Ireland, we shall find that, in after times, the parliament of England concurred with the king in making laws for the people of Ireland; of which there are the following examples in the collection of the English Statutes.

**Acts passed  
by the English  
parliament  
concerning  
Ireland.**

In the reign of king Henry V. there is a statute of the English parliament, which ordains, that all Irishmen, who have benefices or offices in Ireland, shall reside upon them, on pain of losing the profits of them.

And in the third year of the reign of king William and queen Mary, just after the late reduction of Ireland to the obedience of England, (which is a time much fitter to be argued from, on a point respecting the present constitution of the English government, than the reigns of king Henry II. and king John,) there is an act of the English parliament respecting Ireland that is of great importance. For it settles the oaths which are to be taken by the members of both houses of parliament in Ireland before they can sit and vote in their respective houses, besides many other matters of great consequence. And in the eleventh  
year

year of the same king William's reign there is another act of the English parliament which enacts that the forfeited estates in Ireland shall be subject to the same quit-rents as they were subject to on the 13th day of February, 1688, and that the said quit-rents and all other quit-rents which had belonged to the crown of Ireland on the said 13th day of February, 1688, shall be for ever after appropriated to the support of the government of Ireland, and shall be unalienable; which, by the bye, is precisely the same regulation which, we have agreed, would be extremely proper to be made with respect to the quit-rents of North-America.

In queen Anne's reign there are four acts of the English parliament concerning Ireland.

And in the sixth year of the reign of king George I. there is an act of the English parliament to the following purport: " To declare that the kingdom of Ireland ought to be subordinate unto, and dependent upon, the imperial crown of Great-Britain, as being inseparably united thereto; and that  
" the



“ the king’s majesty, with the consent of  
 “ the lords and commons of Great-Britain  
 “ parliament, hath power to make laws to  
 “ bind the people of Ireland.”

Conclusion  
 drawn from  
 the said acts.

From these instances it is plain that the king and parliament of England or Great-Britain, have exercised a legislative authority over Ireland ever since the reign of Henry V. that is, for the space of 350 years, and consequently that the king alone has not been their legislator during all that time. For, if the kings alone had had that authority, we may presume they would sometimes have used it. And even in the old times between the reigns of king John and king Henry V. it seems to have been the practice of the kings of England, in making ordinances of importance for the good government of Ireland, to act in conjunction either with the Irish parliament or a very respectable council in Ireland, which consisted not only of the king’s ordinary counsellors in that country, but of the prelates and great men thereof, and others of the most discreet and respectable Irish gentlemen who dwelt in the neighbourhood

hood of the place where such council was to meet, and such ordinances were to be passed ; which council was a kind of *local*, or *partial*, parliament for that part of the country where it was held. All this is very manifest from the following short chapter of a certain ancient ordinance, thought to have been made about the 31st year of the reign of king Edward III. which is intitled, *Ordinatio facta pro statu terræ Hiberniæ. Item volumus et præcipimus, quod nostra et ipsius terræ negotia, præsertim majora et ardua, in consiliis, per peritos consiliarios nostros, ac Prælatos et Magnates, et quosdam de discretioribus et probioribus hominibus de partibus vicinis, ubi ipsa consilia teneri contigerit, propter hoc evocandos ; in parliamentis verò per ipsos Consiliarios nostros, ac Prælatos et Proceres, aliosque de terrâ prædictâ, prout mos exigit ; secundum Justitiam, Legem, consuetudinem, et rationem, tractentur, deducantur, et fideliter, (timore, favore, odio, aut pretio, postpositis,) discutiantur et etiam terminentur.*

A remarkable passage in an old act of the English parliament in the reign of king Edward III. concerning the legislation to be exercised over Ireland.

In this passage we may observe two things ; 1st, that parliaments in Ireland are spoken of

VOL. II.

L

as

as known and customary assemblies even in that ancient time; for that, I presume, is the meaning of the words, *prout mos exigit*; and, secondly, that even in the council, (which is distinguished from the parliament,) there were to be, besides the King's counselors, (who are denoted by the words *peritos consiliarios nostros*) some prelates and great men (expressed by the words *Praelatos et Magnates*) and some other men of respectable condition and character, who were to be summoned from the neighbouring district to the said councils for the purpose of making these ordinances; which is expressed by these words, *quosdam de discretioribus et probioribus hominibus de partibus vicinis propter hoc evocandos*. It can hardly be pretended, when one considers this passage, that the king of England was at that time the sole legislator of Ireland, with a right to make what laws, and impose what taxes, he thought proper there, as Lord Mansfield said the King might lawfully do in the island of Grenada after the peace in February, 1763, and before the proclamation in the October following.

Whether

Whether or no the kingdom of Ireland is now subject to both the parliament of Great-Britain and its own parliament, and how and when it became so, are questions of considerable difficulty, but which it is by no means necessary to discuss on the present occasion. All that I am now endeavouring to prove is, that the King is not now, and has not been, for more than four centuries, (namely, from the 31st year of the reign of king Edward III.) and does not appear clearly to have been in any former age, the sole legislator of that country, so as to afford a ground for supposing that he became so in the island of Grenada by virtue of the conquest of it.

### FRENCHMAN,

I think this example of Ireland makes rather *against* than *for* the supposed legislative authority of the Crown in the island of Grenada; more especially after that act of the British parliament of the 6th of King George I. which seems to me to be a sort of general declaration of the law upon this subject. For, if it be just reasoning to declare, “that the “ kingdom of Ireland ought to be subordinate “ unto, and dependent upon, the imperial

Application of the reasoning used concerning Ireland in the statute of the 6th of Geo I. to the island of Grenada,

L 2

“ Crown

“ Crown of Great-Britain, as being inseparably united thereto; and that the king, with the consent of the parliament of Great-Britain, hath power to make laws to bind the people of Ireland;” it seems to be equally just to conclude the same thing with respect to the island of Grenada, that is; that, as the said island of Grenada is inseparably united to the imperial Crown of Great-Britain by the final cession made thereof to the said Crown by the king of France in the late treaty of peace, it ought to be subordinate unto, and dependent upon, the said imperial Crown, and that the king of Great-Britain, with the consent of the parliament of Great-Britain, hath power to make laws to bind the people of the same. I can see no difference between the cases.

### ENGLISHMAN.

I own I am much inclined to reason in the same manner, and more especially since the year 1766, when, upon the repeal of the stamp-act, a similar declaratory act was passed with respect to the British colonies in America,

Confirmation  
of the same  
opinion of the  
parliamentary  
right of legi-

slation over the island of Grenada, by the famous declaratory act of parliament in the year 1766, concerning all the British dominions in America,

rica, which is expressed in these words, to wit, "*That the colonies and plantations in America have been, are, and of right ought to be, subordinate unto, and dependent upon, the imperial Crown and Parliament of Great-Britain; and that the King's Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons of Great-Britain, in parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great-Britain, in all cases whatsoever.*" This statute makes no distinction between such colonies and plantations as were properly colonies, or were planted by emigrants from Old England (such as Virginia and New-England,) and such territories as were obtained by conquest, (as Quebeck, Jamaica and Grenada,) which might with more propriety be called *provinces* than colonies: but it relates equally to them both; so that both are, in the eye of the law, in the same political situation, that is, subject to the legislative authority

rity of the king and parliament of Great-Britain acting conjointly, but not to that of the king alone. And, as this statute is merely declaratory of what the law was at the time of passing it, and does not purport to transfer any legislative power that had hitherto been vested in the king alone over any part of America, or that might hereafter legally become vested in the king alone over any future dominion of the Crown in that quarter of the world, from the king alone to the king and parliament conjointly, I should have thought it ought to have been considered as a parliamentary decision of all doubts that might have been entertained before concerning the legislative authority over conquered countries, in favour of the king and parliament conjointly and against the pretensions of the Crown alone.

### FRENCHMAN.

It seems to me to put an end to the whole question. However, as we have entered upon this subject, I beg you would go on with it, if not as a subject of law, yet, at least,

least, as a subject of history of a peculiar and curious kind, and inform me what Lord Mansfield said concerning the exercise of this supposed legislative authority of the crown in the case of Wales and the other countries conquered by the Crown of England, which, you said, he cited in support of it.

### ENGLISHMAN.

What he said of Wales was in these words. "As to Wales, Mr. Barrington is well warranted in what he has said upon the famous *Statutum Walliæ*, or Statute of Wales, in the 12th year of the reign of Edw. I. That statute was certainly no more than a regulation made by the king, *as conqueror*, for the government of that country, which, the preamble of that statute says, was then totally subdued. And, however, for purposes of policy, he might think fit to claim it as a fief appertaining to the realm of England, he could never think himself intitled to make laws, without assent of parliament, to bind the subjects of any part of the realm. Therefore, as he did make laws for Wales with-

Lord Mansfield's assertions concerning Wales.

" out



“ out assent of parliament, the clear consequence is, that he governed it as a conquest ; which was his title in fact, and the feudal right but a fiction.” This was all that Lord Mansfield said concerning the king’s legislative power over Wales.

### FRENCHMAN.

Remarks on  
them.

These words appear to me to be rather obscure and unsatisfactory, considering the importance of the proposition they are intended to prove. For, in the first place, Lord Mansfield seems to invert the argument that was necessary to his purpose, and, instead of shewing that Wales was confessedly a conquered country, and that king Edward, considering it as such, grounded upon that circumstance a right of making laws for it by his single authority, and actually did make laws for it in that manner, he affirms that king Edward did make laws for it by his single authority, and from thence concludes that he must have considered it as a conquest. This reasoning may be just ; but it is too subtle and refined for my comprehension, and serves

serves only to perplex me. And, in the second place, I observe that Lord Mansfield won't take king Edward's word, (as it is given us in the preamble of this statute,) that Wales was a fief of the Crown of England, or that he considered it as such, and proceeded to make laws for it as being such, (which comes to the same thing,) but will needs insist upon it's having been a mere conquest, and upon king Edward's having thought it so, and treated it accordingly. Now, for my part, I am inclined to give more credit to king Edward's own declarations concerning his opinions and the grounds of his proceedings upon this occasion, than to Lord Mansfield's account of them; and therefore I must needs think, either that Wales was really a fief of the Crown of England before king Edward's reduction of it, or, at least, that king Edward thought fit to consider it as such, and treated it as if it had been such; which, with respect to the present question, comes to exactly the same thing, because, if it was treated as a fief, and not as a conquest, it does not afford a precedent of the manner in which it is lawful for a king of England to treat a con-

VOL. II.

M

quered

An inquiry  
into the truth  
of the facts  
asserted by  
Lord Mans-  
field concern-  
ing Wales.

First fact.

Second fact.

quered country. But I am somewhat curious to know how the fact stood upon this subject, both with respect to the feudal dependance of Wales on the Crown of England before the reign of Edward I. and with respect to the authority by which king Edward made the regulations contained in the *Statutum Walliæ*. Is it true, in the first place, as Lord Mansfield seems to assert, that the princes who governed Wales before the reign of king Edward I. were totally independent of the Crown of England, and never did homage for their principality to it's kings? and, in the second place, that king Edward passed the *Statutum Walliæ* by his single authority and without the concurrence of his parliament? These are facts that are curious in themselves, as points of history, and on that account I am desirous to be informed of the truth concerning them, though, perhaps, they are not very material to the decision of the question now under our consideration, concerning the extent of the prerogative of the Crown of Great-Britain with respect to conquered countries at this day, because the constitution of the English government has undergone very considerable

considerable alterations since the reign of king Edward I. though some of the great foundations of it may be still the same.

## ENGLISHMAN.

Your last remark is certainly very just; that the proceedings of the Crown in that remote part of the English history are but indifferent grounds to support any doubtful claims upon, unless they have been followed by similar exertions of authority in more modern times, with the history of which we are better acquainted, and those exertions have been generally acquiesced in and approved of. But, to come to the facts you inquire after;—I have had the same curiosity which you express concerning them, and have therefore looked into books of history, and into the *Statutum Walliæ* itself, to see how the truth was concerning them. And the result is, that both these facts appear to me to be otherwise than Lord Mansfield has represented them: the country of Wales having not been totally independent of England before the reduction of it by king Edward I. but in a

M 2

state

They do not, upon inquiry, appear to be as Ld. Mansfield has represented them.

state of feudal dependance on the kings of England, as king Edward affirms in the *Statutum Walliæ*; and the said statute not having been made by the single authority of the said king Edward, but with the assent of the great men of his kingdom, or the *proceres regni*, which I take to mean the parliament of the kingdom. But, that you may judge for yourself upon these matters, I will mention to you some of the passages in the old writers of the English history, and in the *Statutum Walliæ*, upon which I ground these opinions.

Proofs from history, of the feudal subjection of Wales to the kings of England before the final conquest of it by king Edward I.

In the first place, then, I find in the history of Matthew Paris, (one of the most respectable of the old English historians,) the following passages relating to ancient victories gained by the kings of England over the people of Wales before the final conquest of it by Edward I, even from the time of William the conqueror, which was more than two centuries before the said conquest by king Edward. And most of these victories were concluded by a feudal subjection of the country of Wales to the Crown of England, agreeably

agreeably to king Edward the first's declaration in the *Statutum Walliæ*, that is, by the performance of homage to the kings of England by the princes, or the nobles, of Wales.

In his account of the reign of king William the Conqueror, that faithful historian relates that in the year 1079, (which was the 13th year of the reign of William the Conqueror,) that warlike king marched into Wales with a numerous army, and intirely subdued it, and received homage and fealty from the petty kings, or princes, of that country. This is expressed in these words. *Anno Domini 1079 Rex Anglorum Willielmus in Walliam duxit exercitum copiosum, et eam sibi subjugavit, et à regulis illius ditionis homagia et fidelitates accepit.*

In the reign of king William the Conqueror.

The next king, William Rufus, made an expedition against the Welch, which was less successful than his father's. Yet he by no means yielded up those claims of feudal superiority over them which had been either established, or confirmed, by his father, and which seem to have been quietly submitted to

In the reign of William Rufus.

to during the remainder of the Conqueror's reign, and for the first years of William Rufus's. Matthew Paris's account of this expedition is in these words. *Eodem anno (scilicet, anno domini 1094) Rex Willielmus in Walliam exercitum ducere festinavit, quod anno præterito Wallenses, multis Normannorum occisis, procerum confractis firmitatibus, castello Montis Gomerii direpto et habitantibus in ea interfectis, igne et ferro finitimos depopulati fuerant. Rex autem Willielmus, omnes fines Walliæ hostiliter ingressus, cum, per montium diverticula et sylvarum densitates, ipsos persequi non valeret, constructis in consinio castris, ad propria remeavit.*

In the reign of  
Henry I.

The next king, Henry I. reduced the Welch to submit intirely to his pleasure, as appears from this passage of Matthew Paris. *Eodem anno (scilicet, anno domini 1113,) Rex Henricus, exercitum ducens in Walliam, subdidit sibi Wallenses pro arbitrio regiæ voluntatis.* And in the account of the transactions of the year 1121 the same historian has these words. *Inde autem (scilicet, a Londoniis) cum rex ad Walliam tenderet cum exercitu copioso, Wallenses,*

*Wallenses, ei suppliciter obviantes, concordati sunt cum ipso juxtà suam magnificentiam voluntatis.*

In the reign of king Henry II. in the year of Christ 1157, the Welsh were again obliged to do homage to the king of England. This is related by Matthew Paris in the words following. *Eodem anno Rex Henricus magnam paravit expeditionem, ita ut duo milites de totâ Angliâ tertium invenirent, ad expugnandum Wallenses per terram et per mare. Intrans ergo Walliam rex, extirpatis sylvis, nemoribusque succis, atque viis patefactis, castrum Roelent firmavit, alias munitiones, antecessoribus suis surreptas, potenter revocavit, castellum etiam Basingwere restauravit, et, Wallensibus ad libitum subiectis, cum triumpho Angliam repetivit. Apud Suânduum \* multorum cepit homagia, scilicet, nobiliorum.*

In the reign  
of Hen. II.

In the reign of king John they were again invaded by the English, and reduced to subjection to the Crown of England, and were forced to deliver up to the king twenty-eight persons by way of hostages for their continuing

In the reign  
of king John.

\* Probably Snowden.



nuing subject to him for the future. This is expressed by Mathew Paris in the following words. *Anno gratiæ millesimo, ducentesimo, undecimo (A. D. 1211) Rex Anglorum Johannes fuit ad Natale Domini apud Eboracum, præsentibus comitibus et baronibus regni. Quo etiam anno idem rex apud Album monasterium, magno exercitu congregato, profectus est in Walliam, octavo Idus Julii : ubi in fortitudine gravi, Walliæ interiora perlustrans, ad Snaudunam usque, obviam sibi quæque conterendo, penetravit ; reges omnes et nobiles sine contradictione subjugavit. De subjectione in posterum obsides viginti octo suscepit ; et inde cum prosperitate, in die assumptionis beatæ Mariæ, ad Album monasterium remeavit.* In the following year the Welchmen made an incursion into England, and took some of king John's castles, and put the garrisons of them to death, besides setting several villages on fire, and doing other mischief. This made king John collect a large army together, in order to invade Wales and destroy it with fire and sword, and exterminate it's inhabitants in revenge for the said treacherous rebellion. And he immediately put to death the twenty-eight persons,

persons, who had been put into his hands the year before as hostages for the fidelity of the Welch. But he was persuaded to desist from his main purpose, of invading Wales, by some intimations he received of an intention in his army (by the greatest part of whom he was deservedly hated for his innumerable acts of tyranny and oppression,) either to take away his life themselves or deliver him into the hands of the Welch. Nor did he afterwards resume his design of invading Wales and reducing it again to his obedience, the remaining part of his reign (which was but four years,) being full of intestine troubles. But he does not appear to have ever done any thing that tended to a surrender of his claim of a feudal superiority over the Welch, or of his right to the homage of their princes.

In the year 1231, in the reign of king Henry III. (who was the son of king John, and the father of Edward I.) the Welch again made incursions into England, near Montgomery castle, under the command of Lewellin their prince, and gained an advantage over the English forces belonging to that

In the reign of  
king Hen. III.

VOL. II.

N

castle:

castle: which occasioned the king to march thither with a body of troops to revenge these injuries. And he on this occasion rebuilt Matilda's castle in Wales in an elegant manner with stone and mortar, and put a garrison into it, in order to restrain the Welch from making the like incursions into England for the future. This castle had been destroyed by the Welch a considerable number of years before.

Submission of  
Llewellyn, pr.  
Wales, to king  
Henry, in  
1237.

In the year 1237 Llewellyn, prince of Wales, sent an embassy to king Henry, representing to him that he was now grown old and infirm, and desirous of living in peace and harmony with all the world, and soliciting the friendship and protection of the king of England upon that account, and offering, in order to obtain it, to submit himself and all his possessions to the government and protection of the king of England, and to hold his lands of him in fealty and friendship, by a perpetual and indissoluble compact, and, whenever the king should engage in any military expedition, to assist him with soldiers, arms, horses and money,

to

to the best of his ability, as his faithful vassal or liegeman. The words of Matthew Paris are these; *quod se suisque omnia ditioni ac tutela regis Anglorum subdere decrevit; et de eo tenerat terras suas in fide et amicitia, in toto fœdere indissolubili; et, si rex in expeditionem iturus esset, militiam, armis, et equis et thesauro, secundum vires suas, ut suus fidelis, cum fideliter adjuvando promoveret.* This proposal was accepted by king Henry, and confirmed by several of the great men of Wales, (the *magnates Walliæ*,) as well as by the two bishops of Hereford and Chester on the part of prince Lewellin himself. Now the foregoing words contain the very definition of a fief, or territory holden of another by a feudal and military tenure.

Remarkable words, descriptive of a feudal subjection.

Prince Lewellin at the time of this treaty was much afflicted by the ambitious and undutiful conduct of his eldest son Griffin, who was preparing to make war upon him in order to dispossess him of the government. And it was, in a great measure, with a view to repress the insolence of this son that he applied on this occasion to king Henry for his protection.

Prince Lewellin's dissatisfaction at the undutiful behaviour of his eldest son, Griffin.

He reduces  
Griffin to  
submission.

Death of Lew-  
ellin, in April,  
1240.

Dissensions  
between his  
sons Griffin  
and David.

The former is  
treacherously  
apprehended  
and imprison-  
ed by David.

tion. The consequence was such as he had wished. He got the better of his son Griffin, and reduced him to a compleat submission to his will; infomuch that, when, in about three years after, to wit, in the year 1240, he found his death approaching, he obliged his said son to consent to a settlement he had resolved to make of his principality of North-Wales upon his second son David, who was Griffin's younger brother. Lewellin died soon after, to wit, in April, 1240. But after Lewellin's death Griffin refused to submit to this settlement, and a war arose between the two brothers, till David, by an act of treachery, got Griffin into his power and threw him into prison; upon which Griffin's party, having lost their leader, submitted to the government of David. This act of treachery consisted in an invitation which David gave to his brother Griffin to come and meet him at a certain place, to treat of peace together; where when Griffin, confiding in David's promise of safety to his person, came in a peaceable manner, and in the company of Robert, bishop of Bangor, and other great men of Wales, David caused him to be

be apprehended and sent to prison, notwithstanding all the remonstrances that were made against such a proceeding by the said bishop and other great men in whose company Griffin had come to the said meeting. The bishop of Bangor, through an honest indignation at this piece of treachery, excommunicated prince David, and retired from Wales into England, and there solicited king Henry to oblige David to set his brother Griffin at liberty, whom he had so perfidiously thrown into prison. And the bishop urged the king to do so to prevent a blemish in his own honour from a connivance at so base an act of injustice in prince David, *ne tanta talisque facinorosa transgressio* (says Matthew Paris,) *remotas regiones curiamque Romanam, in honoris regii læsionem, macularet*; which is agreeable to the notion that Wales was at that time a fief of the crown of England, by reason of which it became the duty of the king of England, as upper Lord of it, to attend to the complaints made by it's inhabitants of acts of injustice committed by it's princes who were his vassals or liegemen. Accordingly it appears that, upon this complaint of the bishop

Complaints  
are made of  
this act of  
treachery to  
king Henry

The king  
commands  
David to set  
Griffin at li-  
berty : which  
David refuses  
to do.

A proposal  
made by Grif-  
fin to king  
Henry.

bishop of Bangor, king Henry wrote to prince David to command him to set his brother Griffin at liberty. But David refused to do so, and assured the king that, if his brother were at liberty, Wales could never be at peace. These things coming to the ears of Griffin, he sent a private message to king Henry, by which he assured him that, if he would use his power to set him at liberty and invest him with the government of North-Wales instead of his brother David, he would hold all the country from him, the said king Henry, and faithfully pay him every year the sum of two hundred marks, as an acknowledgment for it, and would moreover assist him to subdue all the Welch who were in rebellion against him, and who were situated at the greatest distance from England and as yet unsubdued, *juvaret eum diligenter omnes sibi rebelles Wallenses, longinquos et indomitos, subjugare.* This offer of Griffin's shews that the greater part of Wales was at that time considered as under a feudal subjection to the kings of England, and that only a few of the most remote parts were considered as hitherto unsubdued by them, (*indomitos,*) or not reduced to such subjection. This

This secret proposal of prince Griffin to the king was supported by the solicitations of a very powerful Welch nobleman, whose name was Griffin ap Madoch, who exhorted him to enter Wales with an army and make war against prince David, who, besides his treacherous behaviour to his brother, had done injuries to many persons of consequence in that country. The king listened to this proposal and advice, and immediately raised a large army and marched with it towards Wales, declaring that he had found prince David to be a most disloyal evader of the commands he had thought fit to send him, and a rebel to his authority, inasmuch as he had refused to come before him to confer upon matters relating to the peace of Wales, according to an order which the king had sent him for that purpose, though the king had promised him a safe conduct, *quem cavillatorem in omnibus invenerat et rebellem, nec volentem ad pacis colloquium, juxta mandatum regis, etiam sub salvo ducatu, aliquando venire.* This is the language of a king towards a subject, and not towards an independent prince: so that Wales must at this time have been considered by  
king

King Henry  
marches into  
Wales against  
prince David,  
with a large  
army.



king Henry III. and the people of England, as a fief of the Crown of England, agreeably to what was afterwards asserted by king Edward I. in the *Statutum Walliæ*.

David treats with k. Hen. and promises obedience to him, and delivers his brother Griffin into his hands: but advises the king to keep him in custody.

The approach of the English army towards Chester, together with the consciousness that he had many enemies amongst the Welch themselves, terrified prince David and made him resolve to solicit king Henry's favour. He therefore sent word to king Henry that he was ready to deliver his brother Griffin into the king's hands, provided the king would leave him in possession of his principality of North Wales, which he was willing to hold of the king, and not only to take the usual oath of fidelity to him on that account, but also to give him hostages for the continuance of his obedience. But he at the same time exhorted the king to keep prince Griffin in confinement, and assured him that, if he did not do so, but should set that prince at liberty, he would soon kindle new disturbances in Wales, even in opposition to the king's authority. The king listened to this proposal of David and followed his advice. Griffin was delivered

delivered by his brother David into king Henry's hands, with several of the most eminent persons of Wales who were given as hostages for the peaceable conduct of prince David and the rest of the Welch nation.

And they were all, by the king's order, carried to London under a guard, and there kept in safe custody in the Tower of that city.

These things were transacted in the summer of the year 1241, and were compleated before Michaelmas day. And, in eight days after Michaelmas, prince David himself, having first obtained a safe conduct from king Henry, came to London and presented himself before the king, and then and there took an oath of allegiance and fidelity to king Henry, and soon after returned to Wales in peace.

*Et post octavum diem festi sancti Michaelis venit David Londinum ad Regem; et, factis ibidem regi ligantiâ, fide, et juramento omnimodæ fidelitatis et securitatis, . . . dimissus in pace est ad propria remeare. Rex igitur, sic Walliâ sibi subjugatâ, sine sanguinis effusione et ancipitis belli casibus, de hostibus suis, Deo propitio, triumphavit.* Here again we have a proof that Wales was *subjugata regi*

The king imprisons prince Griffin in the tower of London. A. D. 1241.

Prince David comes to London, and takes the oath of allegiance to K. Henry.

*Anglia*, reduced to a feudal subjection to the king of England, or, in other words, was a fief of the crown of England. Matthew Paris has recorded the very instrument by which king Henry III. on the foregoing occasion, entered into an agreement with the wife of prince Griffin, who was then a prisoner in his brother David's hands, to set him at liberty and put him in possession of that part of his father Lewellin's lands which, by the custom of Wales, he was intitled to; and that likewise by which prince David bound himself to king Henry to deliver up into the king's hands his brother Griffin, whom he then detained in prison, and Owen, the eldest son of the said Griffin, whom he likewise kept at that time in prison, and all the other persons whom he had hitherto detained in prison on account of the said Griffin, and to abide such judgment as should be given by the king's court concerning the said Griffin's claim to a part of his father Lewellin's lands. The whole tenor of these instruments proves so clearly the feudal subjection of Wales at that period to the crown, that Matthew Paris, after reciting them and relating the attempt which prince

prince David made three years after, to wit, in the year 1244, to withdraw himself from the said feudal subjection, and become a vassal of the Pope, cannot forbear expressing his wonder that the court of Rome should countenance such rebellious and treacherous behaviour, and exclaiming in these lively words against any plea of ignorance of the state of Wales which the defenders of the proceedings of that court may be supposed to set up as an excuse for them; *Et quis christianorum ignorat Principem Walliæ regis Angliæ esse Vassalulum?* These instruments contain such a lively picture of the dependance of the principality of Wales upon the Crown of England according to the feudal customs then in use in England, that they are exceeding curious and well worth your reading at some hour of leisure, as you seem fond of this species of antiquities.

## FRENCHMAN.

I shall be extremely glad to read them, or rather to hear you read them to me; and that at this very time, that we are examining the question, whether Wales was or was not a

fief of the Crown of England before the reign of Edward I. For I am now perfectly at leisure, and my curiosity is awakened upon the subject : and I suppose you have the book at hand, as you seem to have been lately collecting those extracts from it which you have been just now reading to me in the course of our conversation. I therefore beg you would read me those instruments without further ceremony, if it does not give you too much trouble. For my part, I am so desirous of hearing them that I am sure I shall not find them tedious.

## ENGLISHMAN.

The keenness of your curiosity makes me think it no trouble at all to read them over to you, notwithstanding I have so lately read them by myself. For society in the pursuit of knowledge, as in every other occupation, doubles the pleasure that arises from it, and lessens our sense of the labour we bestow upon it. And you rightly conjecture that I have the book at hand, and have lately been making the abovementioned extracts from it.

I will

I will therefore immediately fetch it from the next room, which is my library, and read these instruments to you without further delay. But you must take care not to gape while I am reading them, which perhaps you may find yourself inclined to do, as I believe they are longer than you perhaps imagine.

### FRENCHMAN.

Never fear me. My curiosity will prevent that: and, besides, I am bound in honour to hear them out patiently, after having pressed you so earnestly to take the trouble of reading them.

### ENGLISHMAN.

Well, here's the book that contains these instruments. The first of them is a deed of covenant between two parties, to wit, Henry, the third, king of England, on the one hand, and Senena, the wife of prince Griffin, eldest son of Lewellin, the late prince of North Wales, then a prisoner to his brother David, acting in the behalf of her said husband

Griffin,

A deed of covenant between king Hen. III. and Senena, the wife of Griffin, prince of Wales, for the release of Griffin from the imprisonment in which he was detained by his brother David.

Griffin, on the other hand. It is in these words. *Convenit inter dominum Henricum tertium, Regem Anglorum illustrem, ex unâ parte, et Senenam, uxorem Griffini, (filii Leolini, quondam Principis Northwalliæ) quem David frater ejus tenet carceri mancipatum, cum Owenio filio suo, nomine ejusdem Griffini, ex alterâ : Scilicet, quòd prædicta Senena manu cepit pro prædicto Griffino, viro suo, quòd dabit domino Regi sexcentas marcas, ut dominus Rex eum & prædictum Owenium, filium suum, liberari faciat à carcere prædicto; ita quòd stabit judicio curiæ suæ, si de Iure debeat carcere detineri. Et ut dominus Rex postea à judicium : curiæ suæ, secundum legem Wallensium, ei & hæredibus suis habere faciat, super portione quæ eum contingit de hæreditate quæ fuit prædicti Leolini, patris sui, & quam prædictus David deforciat ipsi Griffino. Item quòd, si idem Griffinus, vel hæredes sui, per considerationem curiæ domini Regis recuperent portionem, quam se dicunt contingere de hæreditate prædictâ; Eadem Senena manu cepit pro prædicto Griffino, viro, & hæredibus suis, quòd ipse & hæredes sui in perpetuum inde reddent domino Regi sexcentas marcas annuas; scilicet tertiam partem in denariis,*

nariis, & tertiam partem in bobus & vaccis,  
& tertiam partem in equis, per æstimationem le-  
galium hominum, liberandum Vicecomiti Salo-  
pesburie & per manus ipsius Vicecomitis ad Scac-  
carium domini Regis deferendum, & ibidem li-  
berandum: Scilicet unam medietatem ad  
festum sancti Michaelis, & alteram ad Pas-  
cham. Eadem etiam Senena, pro præfato  
Griffino, viro suo, & hæredibus suis manu ce-  
pit, quod firmam pacem tenebunt cum præfato  
David, fratre suo, super portione quæ eidem  
David remanebit de hæreditate prædictâ.  
Manucepit etiam eadem Senena pro dicto  
Griffino, viro suo, & hæredibus suis, quod si  
aliquis Wallensis aliquo tempore domino Regi,  
vel hæredibus suis, rebellis fuerit, præfatus  
Griffinus & hæredes sui, ad custum suum pro-  
prium, ipsum compellent ad satisfaciendum  
domino Regi & hæredibus suis. Et de his om-  
nibus supradictis firmiter observandis, dicta  
Senena dabit domino Regi David & Rotherum,  
fiscos suos, obsides: ita tamen, quod si de præ-  
fato Griffino, viro suo, & Owenio filio suo, qui  
cum eo est in carcere, humanitus contingat  
antè quàm inde liberentur, alter prædictorum  
filiorum eidem Senenæ reddetur, reliquo obside  
remanente.



remanente. Iuravit insuper eadem Senena, tactis sacrosanctis Euangeliiis, pro se & pro præfato Griffino, viro suo, & heredibus suis, quòd hæc omnia firmiter observabunt. Et manucepit, quòd dictus Griffinus, vir suus, idem jurabit cùm à carcere liberatus fuerit. Et super præmissis se submisit, nomine dicti Griffini, viri sui, Jurisdictioni venerabilium patrum Herefordensis & Lichfeldensis Episcoporum: Ita quòd præfati Episcopi, vel eorum alter, quem dominus Rex elegerit, ad requisitionem ipsius domini Regis, per sententias excommunicationis in personas, & interdicti in terras, eos coerceant ad prædicta omnia & singula observanda. Hæc omnia manucepit prædicta Senena & bonâ fide promisit se facturam & curaturam quòd omnia impleantur: & quòd præfatus Griffinus vir suus, cùm liberatus fuerit, & heredes sui, hæc omnia grata habebunt, & complebunt, & instrumentum suum inde dabunt domino Regi in formâ prædictâ. Ad maiorem siquidem hujus rei securitatem, factum est hoc scriptum inter ipsum dominum Regem & dictam Senenam nomine præfati Griffini, viri sui: ita quòd parti remanenti penes ipsum dominum Regem appositum est sigillum.



lum præfati Griffini, per manum dictæ Senenæ uxoris suæ, unâ cum sigillo prædictæ Senenæ ; & parti remanenti penès ipsam Senenam, nomine præfati Griffini viri sui, appositum est sigillum domini Regis: quòd de supradictis etiam omnibus complendis, & firmiter observandis, dedit prædicta Senena, nomine præfati Griffini, viri sui, domino Regi plegiis suprascriptos ; Videlicet, Radulphum de Mortuo mari, Walterum de Clifford, Rogerum de Monte alto, Senescallum Cestriæ, Mailgun filium Mailgun, Mereduc filium Roberti, Griffinum filium Maddoc de Brunfeld, Houwell & Mereduc fratrem ejus, Griffinum filium Wenurwen. Qui hæc omnia pro præfatâ Senenâ manuceperunt, & chartas suas ipsi domino regi fecerunt. Acta apud Salopesburiam die Lunæ proximâ ante Assumptionem beatæ Mariæ virginis. Anno regni regis ipsius vigesimo quinto.

The next instrument recited by Matthew Paris on this occasion, is the charter of Roger de Montalt, steward of Chester, a great English baron of those days, (who probably had possessions in the English counties bordering upon Wales,) whereby he became a pledge,

VOL. II.

P.

or

or surety, to king Henry for the due performance of every thing that Senena, the wife of prince Griffin, had covenanted to be performed to the said king, by the said Griffin. And there were similar instruments executed to the king by all the other barons, both English and Welch, mentioned in Senena's deed of covenant above recited, as her pledges to the king for the due performance of the said covenant, namely, Ralph Mortimer, Walter Clifford, Mailgun the son of Mailgun, or, (as I suppose) Mailgun ap Mailgun, Mereduc the son of Robert, or Mereduc ap Robert, Griffin, the son of Madoc, of Brunfeld, or Griffin ap Madoc, of Brunfeld, Howel, and Mereduc, his brother, and Griffin, the son of Wenunwen, or Griffin ap Wenunwen, of whom all but Ralph Mortimer and Walter Clifford, seem to have been powerful men of Wales. This charter of pledgeship is in these words. *Omnibus hac scriptum visuris Rogerus de Monte alto, Senescallus Cestrie, salutem. Sciatis quod ego me constitui plegium Senenæ uxoris Griffini filii Leolini, quondam Principis Norwalliæ, Et manucepi pro eâ erga dominum meum, Henricum, regem Angliæ illustrem,*

A charter, or deed, of pledgeship, of Roger de Montalt.

*item, quod omnia que conventionavit eidem domino meo nomine prefati viri sui, pro liberatione sua & Owenii filii sui à carcere in qua David frater ejus eos detinet; & pro portione que ipsum Griffinum contingit de hereditate, que fuit predicti Leolini patris sui, & quam prefatus David frater ejus ei deferat, domino regi firmiter observabit. In cujus testimonium, hunc scripto sigillum meum apposui. Actum apud Salapetburiam die Lunæ ante assumptionem B. Mariæ. Anno regni ipsius xcv.*

The next instrument recited by Matthew Paris is a charter, or deed, of fealty, by which Mardoc ap Howel, a powerful Welch baron, recorded and confirmed an oath of fealty, or allegiance, which he had taken to king Henry, by which he had bound himself to be for ever faithful to him, and also recorded and confirmed a certain truce, or suspension of hostilities, which he had lately made with the above-mentioned Ralph Mortimer, with whom he had been at war. This instrument seems to be curious also in another view, by shewing us that, in this remote age, the great barons of England did sometimes make war

A charter, or deed, of fealty of a great Welch baron, or land-holder, to king Henry III.

upon each other, like little sovereigns, without the king's command. It is in the words following. *Sciant præsentēs & futuri, quod ego Merducus, filius Howel, tactis sacrosanctis juravi, quod ab isto die in antea omnibus diebus vitæ meæ ero ad fidelitatem domini regis Angliæ, & serviam ei fideliter. & devotè cum omnibus viribus meis, & toto posse meo; quandocunque indiguerit servitio meo; & treugam inter dominum Radulphum de Mortuo Mari & me initam, usque ad festum sancti Michaëlis, anno regni regis Henrici vigesimo quinto, ex parte meâ fideliter observabo: & tam ad fidelitatem domino regi in perpetuum observandam, quam ad treugas prædictas observandas usque ad terminum prædictum, supposui me jurisdictioni domini Herefordensis episcopi, & domini Coventrensis & Litchfeldensis episcopi, vel alterius eorum, quem dominus rex ad hoc elegerit, ut si in aliquo contrâ prædictam fidelitatem domini regis, vel contrâ observantiâ prædictarum treugarum, venero, liceat eis, vel eorum alteri, quem dominus rex ad hoc elegerit, personam meam & omnes meos excommunicare, & terram meam interdicere, donec de transgressione ipsâ satisfacero ad plenum. Et si forsitan infra prædictum festum*

*festum S. Michaëlis, inter prædictum Radulphum de Mortuo Mari & me nulla pax fuerit reformatâ, licet post festum illud bellum moveam prædicto Radulpho, non obligabit me prædictum juramentum, dum tamen erga dominum regem fidelitatem observem continuam, sicut prædictum est. Et si bellum post prædictum terminum inter nos moveatur, nihilominus dominus rex sustinebit, quod ego & mei receptemur in terrâ suâ, sicut alii fideles sui. Ad prædicta autem observanda domino regi & hæredibus suis, obligo me per juramentum prædictum, & per sigilli mei appositionem, quod huic scripto apposui, ad majorem confirmationem prædictorum. Actum in crastino assumptionis beatæ Mariæ, anno regni regis Henrici vigesimo quinto.*

The historian then tells us that the following Welch barons, to wit, Owen ap Howel, Mailgun ap Mailgun, Mereduc ap Mereduc, Howel ap Cadwalthlen, and Cadwalthlen ap Howel, executed charters of fealty to the king of the same tenour with the foregoing.

The

Substance of  
a charter, or  
deed, of feal-  
ty made by  
David, prince  
of Wales, to  
K. Henry III.

The last instrument recited by Matthew Paris upon this occasion is the charter of prince David, by which that prince binds himself to king Henry to deliver up his brother Griffin, then a prisoner in his custody, and his brother Griffin's eldest son, Owen, and the other persons then in prison by his, David's, order on account of his said brother Griffin, into king Henry's hands; and to submit to the judgement of king Henry's court with respect to the claim of Griffin to a part of his father Lewellin's lands; and to do many other things therein mentioned, for king Henry's satisfaction; and, particularly, to hold his share of his father Lewellin's inheritance, that shall be adjudged to him by the king's court, of king Henry *in capite*; and that his brother Griffin shall do the same with respect to the part thereof which shall be adjudged to him. The words of this deed, or charter, are as follows: *Omnibus Christi fidelibus, ad quas presentes literæ pervenerint, David, filius Leolini, salutem. Sciatis quod concessi domino meo, Henrico, regi Angliæ illustri, filio domini Johannis regis: quod deliberabo Griffinum fratrem meum, quem tenco incarceratum,*

The words  
of the said  
charter.

incarcerationum, unâ cum filio suo primogenito,  
 & aliis, qui occasione prædicti Griffini sunt  
 in parte meâ incarcerationati, & ipsos eidem do-  
 mino meo regi tradam. Et postea stabo iuri  
 in curiâ ipsius domini regis, tam super eo,  
 utrum idem Griffinus debeat teneri captus,  
 quàm super portione terra, qua fuit prædicti  
 Leolini patris mei, si qua ipsum Griffinum  
 contingere debeat secundum consuetudinem  
 Wallensium; ita quod pax seruetur inter me &  
 prædictum Griffinum fratrem meum, [et] quod  
 caveatur de ipsâ tenendâ secundum considera-  
 tionem curiâ ipsius domini regis: & quod tam  
 ego quàm prædictus Griffinus portiones nostras,  
 qua nos contingunt de prædictis terris, tenebi-  
 mus in capite de prædicto domino rege. Et  
 quod reddam Rogero de Monte alto, senescallo  
 Cestria, terram suam de Madant cum perti-  
 nentiis: & sibi & aliis baronibus & fidelibus  
 domini regis, seignas terrarum suarum, occu-  
 patarum à tempore belli orti inter ipsum  
 dominum Johannem, regem, & prædictum  
 Leolinum, patrem meum: salvo jure proprie-  
 tatis cujuscunque pacti & instrumenti, super quo  
 stabitur iuri hinc, inde, in curiâ ipsius domini  
 regis. Et quod reddam ipsi domino regi  
 omnes



omnes expensas, quas ipse & sui fecerunt occasione exercitus istius. Et quòd satisficiam de damnis & injuriis illatis sibi & suis, secundum considerationem curiæ prædictæ, vel malefactores ipsos ipsi domino regi reddam. Et quòd similiter domino regi reddam omnia homagia, quæ dominus Jobannes, rex, pater suus, habuit, & quæ dominus rex de jure habere debet: & specialiter omnium nobilium Wallensum. Et quòd idem dominus rex non dimittet aliquem de suis captivis, quin ipsi domino regi & suis remaneant seisinæ suæ. Et quòd terra de Englesmere, cum pertinentiis suis, in perpetuum remanebit domino regi & hæredibus suis. Et quòd de cætero non receptabo utlagos vel foris banniatos ipsius domini regis, vel baronum suorum de marchia, in terrâ meâ, nec permittam receptari. Et de omnibus articulis supradictis, & singulis, firmiter & in perpetuum observandis, domino regi & hæredibus suis, pro me & hæredibus meis, cavebo per obsides & pignora, & aliis modis, quibus dominus rex dicere voluerit & dictare. Et in his & in omnibus aliis stabo voluntati & mandatis ipsius domini regis, & iuri parebo omnibus in curiâ suâ. In cujus rei

rei testimonium præsentī scripto sigillum meum  
 appendi. Actum apud Alnet. juxta fluvium  
 Elvey de sancto Asapho, in festo decollationis  
 S. Johannis Baptiste, anno predicti domini  
 regis Henrici vigesimo quinto. Et sciendum,  
 quod illi qui capti detinentur cum prædicto  
 Griffino, eodem modo tradentur domino Regi,  
 donec per curiam suam consideratum fuerit,  
 utrum, & quomodo, debeant deliberari. Et  
 ad omnia firmiter tenenda, ego David juravi  
 super crucem sanctam, quam coram me feci  
 deportari. Venerabilis etiam pater Howelus  
 episcopus de sancto Asapho, ad petitionem me-  
 am, firmiter promisit, in ordine suo, quod  
 hæc omnia prædicta faciet & procurabit, mo-  
 dis quibus poterit, observari. Edenevet squi-  
 dem Wangan, per præceptum meum, illud idem  
 juravit super crucem prædictam. Actum ut  
 supra. Præterea concessi pro me & hæredibus  
 meis, quod si ego vel hæredes mei contra pacem  
 domini regis vel hæredum suorum, vel contra  
 articulos prædictos, aliquid attentaverimus,  
 tota hæreditas nostra domino regi & hæredi-  
 bus suis incurratur. De quibus omnibus &  
 singulis, supposui me & hæredes meos juris-  
 dictioni archiepiscopi Cantuariensis, & epis-  
 coporum

*coporum Londinensis, Herefordensis, & Coventrensis, qui pro tempore præerunt, quòd omnes, vel unus eorum, quem dominus rex ad hoc elegerit, possit nos excommunicare, & terram nostram interdicare, si aliquid contra prædicta attentaverimus. Et procuravi, quòd episcopi de Bangor, & de sancto Asaph, chartas suas domino regi fecerunt, per quas concesserunt, quòd omnes sententias, tam excommunicationis quàm interdicti, à prædictis archiepiscopo, episcopis, vel aliquo eorum, ferendas, ad mandatum eorum exequentur.*

## FRENCHMAN.

Conclusions  
drawn from  
the foregoing  
charters.

I am much obliged to you for reading these charters to me, and have been greatly entertained by them. They seem to me to prove most clearly that Wales was at that time held of the crown of England as much as any part of England itself; or, at least, that those parts of Wales over which the influence of the two brothers Griffin and David extended, were held so. Griffin's wife Senena even engages for him that he and his heirs for ever shall pay a yearly rent, or acknowledgement, to king Henry and his successors,

cessors, of the value of 300 marks *per annum*, for his portion of his father Lewellin's lands, besides engaging that he shall, at his own expence, compel any of the Welch, who shall at any time rebel against the king, to return to his obedience and make the king full satisfaction. And David, (whose charter of fidelity seems to be more important than the other, because David was at that time in possession of the government of Wales, and was permitted by king Henry to continue so in consequence of his performing the things stipulated in that charter,) speaks of king Henry as being *his Lord*, [*domino meo Henrico, regi Angliæ,*] and promises to abide the judgement of the king's court, both concerning the justice of his imprisonment of his brother Griffin, and concerning the claim of Griffin to a part of his father Lewellin's lands, and that both he and Griffin shall hold their lands of Henry *in capite*. And he further engages to procure king Henry all the homages in Wales which king John, his father, had received, and which king Henry himself ought by right to have received, that is, he says, the homages

of all the nobles of Wales. [*Et quod similiter domino regi reddam omnia homagia quæ dominus Johannes rex, pater suus, habuit, et quæ dominus rex de jure habere debet, et, specialiter, omnium nobilium Wallensium.*] Nothing can be a clearer proof than these words, that Wales was at the time of this charter in a state of feudal subjection to the crown of England. But, I think, they seem also to shew that it was not a single fief of the crown, held of the kings of England by the princes of Wales alone, (as Normandy had been held of the crown of France by the dukes of Normandy alone,) but rather that it was an assemblage of fiefs of the crown of England, held severally by all the nobles of the country as well as by the princes of it. For the nobles of Wales do not appear to have held their lands of the princes of Wales (as the nobles of Normandy held their lands of the duke of Normandy) but to have held them immediately of the king of England, and that by military tenure. For this seems to be the meaning of the words used in the second instrument you read to me, to wit, the charter of allegiance, or fealty, of the Welch nobleman named *Merduc ap Hôwel*, which are as follows ;

Wales was not a single fief holden of the crown of England by the prince of Wales, but an assemblage of fiefs holden severally of the crown of England by the princes and other great barons, or land-holders, of the country.

lows ; *Juravi, quod omnibus diebus vitæ meæ  
ero ad fidelitatem domini regis Angliæ, et ser-  
viam ei fideliter et devotè cum omnibus viribus  
meis et toto posse meo, quandocunque indigue-  
rit servitio meo.*

## ENGLISHMAN.

Your remark seems very just. It does indeed appear from these instruments, that Wales was not a single fief of the crown of England, but an assemblage of fiefs, the several nobles, or great land-holders, of the country, all holding their lands immediately of the crown, and doing, or owing, homage for them to the king. And, as to the government of it, it seems probable from several passages in the said Matthew Paris's history, that the kings of England permitted them at this time to elect their own governours, whom they called princes, and to make use of their own laws and customs, so far as was consistent with their allegiance to the crown of England, and with the obligation they lay under, in consequence of that allegiance, to submit to the judgement of the king's great court in such cases as should be brought before

A conjecture concerning the government of Wales about the year 1241.

fore it, as for instance, in disputes with their princes, or between baron and baron, both tenants *in capite* of the crown, concerning their lands. This seems to me to have been at this time the political condition of Wales.

## FRENCHMAN.

This political condition seems to be a closer connection with the crown of England than the condition of a country holden of the same crown as a single fief by the prince of it, and in which all the land-holders but the prince, had held their lands immediately of the prince, and not of the king of England. For in that case only the prince of the country would be immediately connected with the crown, whereas in the present case every great noble, or land-holder, was so connected. Wales therefore was at this time more distant from the state of a country that was totally independant of the crown of England, (which was the state in which Lord Mansfield seems to have supposed it to be before the conquest of it by king Edward the 1st,) than it would have been if  
it

it had been held of the crown by its princes as a single fief, in the same manner as Normandy had been held by its dukes of the crown of France. And therefore it ought by no means to be considered in the light of a mere conquered country, taken from an alien enemy, when Edward the 1st reduced it to his obedience, as Lord Mansfield seems to have considered it; nor can any argument be derived from it, one way or the other, concerning the extent of the prerogative of the crown with respect to conquered countries.

No argument can be drawn from the case of Wales with respect to the power of the Crown over conquered countries.

But, pray, since we have gone so far into the history of the dependance of Wales on England, let me know what Matthew Paris and the other old historians say of the condition of that country during the remaining part of the reign of king Henry the 3d after the year 1241, when the aforesaid charter of prince David was executed, and during the ten or eleven first years of the reign of king Edward the 1st, and before his final reduction of the country and passing the *Statutum Wallie*, which, I think you said, was in the year 1284. Did either king Henry or king Edward,

Of the political condition of Wales from the year 1241 to the final reduction of it by K. Edw. I. in the year 1284.



Edward, during this interval, remit the homages of the princes and other great barons of Wales, or, in any other manner, renounce their sovereignty over Wales, and acknowledge it to be an independent country?

### ENGLISHMAN.

Far from it. The connection between Wales and the crown of England was rather straitened than relaxed during this period, as you will judge from the short summary of the history of it which I will now endeavour to relate to you.

After the aforesaid agreement between David, prince of Wales, and king Henry, which was in the year 1241, every thing went on smoothly between them for about three years. And it seems probable that David's ambition during this time was somewhat restrained by the fear that king Henry might, if he was provoked by any new attempts of David, set his brother Griffin (who was a prisoner all that time in the Tower of London) at liberty, and encourage him to lay claim to the government of Wales.

But

But he was delivered from this apprehension in the month of March in the year 1244; by the death of Griffin, who, growing impatient of his confinement, was killed in endeavouring to make his escape from the Tower. The manner of his death was this. He tore into long slips the sheets and tablecloths and tapestry of his apartments, and sewed, or fastened, them together so as to make a long string, by which he hoped he should be able to let himself down from one of the windows of his apartment and so make his escape. And he accordingly attempted it. But, the string proving to be too short to reach the ground, he hung for some time in the air at the end of the string at a considerable height from the ground; and at last, the string breaking with his weight, he fell down through that remaining space upon the ground, and broke his neck. King Henry, when he heard of it, was angry with the persons who had the custody of him, for their negligence in not preventing him from making such an attempt, and ordered his eldest son, Owen, who had been kept a prisoner with him in the Tower, to be

Death of Griffin, the Welch prince, in the Tower of London, in March, 1244.

VOL. II.

R

guarded

Prince David prevails with the Pope to absolve him from his allegiance to K. Henry.

A. D. 1244.

guarded with greater care. But the death of this prince Griffin seems in the event to have been a misfortune to king Henry. For very soon after it we find his brother David caballing with the Pope to shake off his obedience to the king, and become a vassal, or tenant, of the Pope, and pay him a rent of five hundred marks *per annum* for the lands he held in Wales, if the Pope would absolve him from his oath of allegiance to king Henry, which he pretended had been extorted from him by violence: and the Pope agreed to the proposal, to the great and just indignation of our honest historian, Matthew Paris.

Prince David and the Welchmen rebel against king Henry, and make incursions into England.

A. D. 1244.

Upon this agreement with the Pope, which was in the year 1244, prince David and the Welchmen openly took arms against king Henry and invaded the adjoining counties of England; and, by the negligence and inactivity of the king, they met with considerable success. The war, or rather rebellion, continued through the year 1245 and to the year 1246, but with great losses and misfortunes to the Welch as well as the English; and in the

the spring of the year 1246 prince David died, leaving Wales in a miserable state of confusion and desolation. Upon David's death the Welchmen chose for their prince, or leader, the son of one Griffin, who was a great favourite of king Henry, who seems to have been the person mentioned in the account of the year 1241, under the name of Griffin ap Madock, as a very powerful Welchman, who at that time persuaded the king to march into Wales with an army against prince David in order to force him to set his brother, prince Griffin, at liberty. When this Griffin, king Henry's favourite, heard that the Welchmen had chosen his son for their prince in the year 1246, he left the king, who had till then entertained him at his court with great honour, and fled into Wales to support his son in his new dignity. And the hostilities continued between the English and Welch for some years, to the great disadvantage of the Welch and devastation of their country, insomuch that some of the Welch bishops fled into England to beg a charitable subsistence from some of the rich religious houses there, the lands of their

Upon the great devastation of Wales in the course of the rebellion, some of the Welch bishops fled into England for a subsistence.

R 2                      bishopricks

In A.D. 1250 the Welch are intirely reduced to the obedience of king Henry.

The king appoints John de Grey, an English baron, for their governour, in consideration of a yearly rent of 333 pounds sterling.

And soon after appoints another English baron, nam'd Alan de Zouch, governour of Wales in the room of John de Grey, in consideration of a yearly rent of 733 pounds sterl.

bishopricks being laid waste and rendered of no value to them. At last in the year 1250, that is, four years after the death of prince David, and six years after the commencement of this rebellion, the Welch were quite conquered and reduced to the obedience of king Henry, and obliged to receive the English law amongst them, and an English baron for their governour, to whom king Henry let their country, or the government of it, to farm for a yearly rent in money. The first person he appointed in this manner to govern Wales was one John de Grey, who paid him five hundred marks, or three hundred and thirty three pounds sterling, a year for the government; and in a short time after he removed this John de Grey from the government, and gave it to another English baron, named *Alan de Zouch*, who offered him a higher rent for it, namely, the yearly sum of eleven hundred marks, or seven hundred and thirty three pounds sterling a year. This was the case with that part of Wales which was adjoining to Cheshire. It does not appear that the more remote and interiour parts of Wales were yet reduced to this condition.

This

This *Alan de Zouch* had the title of *Justitiarius Walliæ*, or Justitiary of Wales, or those parts of Wales which were adjoining to Cheshire. And Matthew Paris says that in the year 1252, he brought a considerable quantity of money from thence, of the king's revenue, in carts, to the Exchequer in London, and that he there publicly declared on that occasion, *quòd tota Wallia obedientèr et in pace legibus subjacet Anglicanis*, that all Wales was reduced to the king's obedience, and had quietly submitted to the English law. And the bishop of Bangor, who had retired to the abbey of Saint Alban's, said the same thing. At this time therefore Wales was more than a fief of the crown of England; it was a part of the realm of England in the actual possession of the king.

The title of AlandeZouch was *Justitiarius Walliæ*, or Justitiary of Wales.

In the year 1254 king Henry the 3d gave Wales, Gascony, Ireland, Bristol, Stamford, and Graham, to his eldest son prince Edward, who was afterwards king Edward the 1st, but who was at that time a boy of fifteen years of age, and whom he had just then married to Eleanor, the sister of Alphonso,

King Henry makes a donation of Wales and Ireland, and several other dominions, to his son Prince Edward upon his marriage.  
A. D. 1254.

one

one of the kings of Spain. By this donation, I conceive, Wales for the first time became a *single* fief of the crown of England, having before the late rebellion been (as we before observed) an assemblage of fiefs holden of the Crown by the several great land-holders, or nobles, amongst whom it was divided, who all did homage to the kings of England for the lands they respectively possessed.

New disturbances arise in Wales in consequence of the oppressions of one Godfrey de Langley, their governour.

They will not acknowledge Pr. Edward for their lord.

The peace of Wales was soon after disturbed by the oppressions of one Godfrey de Langley, whom the king had set over them as their governour, or justiciary, and who seems to have been continued in that office after the king's gift of the country to his son Edward. These oppressions were so many and great that the Welchmen again took arms for their defence. They had not acknowledged Prince Edward for their lord, in consequence of the above donation of his father, though they had submitted to the king himself: but they seem to have thought that the king had no right to alienate his immediate sovereignty over them to his son without

without their consent; and they were not disposed to consent to have Prince Edward for their lord on account of the extream insolence and injustice with which he and his whole household, by his example and permission, treated every one they had any concern with. For such were the unpromising beginnings of prince Edward's conduct, though he afterwards proved a great and prudent king. The Welch, however, were not terrified by his haughtiness, but boldly made war upon him about this time, and penetrated as far as Chester in their incursions on the English territory, laying all the country waste as they passed through it. Nor was prince Edward, or the king his father, at this time able to resist them, the king's treasures having been lately exhausted by expences in foreign parts, and the English nation being highly discontented with the repeated acts of oppression committed by the king, and the disgusting behaviour of his son Edward, so as to be unwilling to assist them in repulsing the Welch, and not sorry to see them involved in difficulties which might tend to repress their tyranny. These things happened

Pr. Edward in this early part of his life behaved with great insolence and injustice.

The Welch make incursions into England; and meet with but little resistance.  
A. D. 1256.

The English nation are dissatisfied with the behaviour of both king Henry and his son, Prince Edward.



The Welch  
raise two very  
powerful ar-  
mies.

Pr. Edward  
threatens to  
bring over an  
army from  
Ireland to re-  
duce them.

The Welch  
provide ship-  
ping to pre-  
vent such an  
invasion from  
Ireland.

pened in the years 1256 and 1257, in which latter year the revolt of the Welch seems to have been very general, as they are reported to have raised two armies against the English of no less than thirty thousand men each, of whom five hundred men in each army were horsemen clothed in elegant armour, and mounted on horses which were covered all over with iron. Prince Edward, being unable to resist this force with the troops he had then at his command in England, and being unable to procure any assistance from his father for the reasons above-mentioned, threatened to bring over an army from Ireland, (which the king had made over to him as well as Wales,) to reduce the Welch to obedience, threatening to break them to pieces like a potter's vessel. But this invasion they endeavoured to prevent by building a number of gallies, and fitting them out for the sea with arms and victuals, to oppose any such Irish forces in their passage on the sea from Ireland to the coast of Wales. These efforts for their defence at this time were attended with success under the command of the prince they had chosen to command them, whose

whose name was Lewellin, and who was one of the sons of the late prince Griffin, who had died in confinement in the Tower of London. And Matthew Paris (who had blamed them before for rebelling against king Henry in the year 1244, under their former prince David, as being guilty of perfidy and injustice against the king) commends them for their present insurrection, as being justly warranted in taking arms by the oppressions they had suffered from Godfrey de Langley, the justiciary whom the king had set over them; and says that their cause was allowed to be a just one even by their enemies. This honest historian (who seems to have had no notion of the doctrines of passive obedience and non-resistance,) laments at the same time the ignominious tameness and timidity of the English nation in submitting to the various oppressions the king had exercised towards them, instead of rising in arms like the gallant Welchmen, to procure the redress of their grievances. The Welch, under the command of their prince Lewellin, gained a victory in this year 1257 over an army which king Henry brought against them;

Vol. II.

S

but,

which no other  
could have done  
the same thing  
in the same way

which no other  
could have done  
the same thing  
in the same way

They gain a  
victory over  
king Henry's  
army, in the  
year 1257:

but, soon after,  
sue for peace  
upon moderate  
and reasonable  
terms.

but, upon the king's raising another great army to oppose them, and procuring bodies of troops to be sent him from Scotland and Ireland, in order to surround and invade their country on every side, prince Lewellin, by the advice of his great men [*de consilio suorum optimatum*] sent messengers to the king to beg for peace, but upon condition that they should be restored to the enjoyment of their own laws and ancient liberties, as they had enjoyed them till within a few years past; and that they should not be subject to prince Edward, or any other person than the king himself: for that they would not bear for the future to be transferred, or sold, from one person to another, like so many oxen or asses. This just and moderate request the king refused to grant, threatening to punish the Welch with great severity. But he gained no advantage over them during the summer, and in the winter returned ingloriously to London.

King Henry  
refuses to  
make peace  
with them.

An inference  
from the said  
proposal of the  
Welch to king  
Henry for  
peace.

From this proposal of prince Lewellin it appears that the Welch considered themselves as subjects of the king of England, but as subjects who had been oppressed by his government,

retirement, and who had been driven by such oppression to the necessity of taking up arms for their defence: and the oppressions they seem to have had in view, were, first, the abolition of their laws and customs by the introduction of the English laws, which had lately been established among them; 2dly, the extortions of money and goods from them which had been committed by the governours, or justitaries, whom the king had set over them; and, 3dly, the transferring the immediate feudal superiority over them from the king to his son, prince Edward, without their consent. But they acknowledge that they ought to be subject to the king himself, provided he will govern them with justice and moderation.

King Henry having rejected the proposition made him by prince Lewellin for a peace, the war continued, and the Welch gained considerable advantages in it, meeting with but little resistance from the English, and being secretly encouraged by some powerful barons in England (of whom it was suspected that Simon de Montfort, earl of

The war continues between the Welch and English.

The Welch are secretly encouraged by some powerful English barons.

S 2

Leicester,

Leicester, was one,) to continue their hostilities. This was the same earl of Leicester who became soon afterwards so famous by heading the confederacy of the English barons who took arms to redress the tyrannical government of the king.

The English gain an advantage over the Welch by treachery.  
A. D. 1258.

In the year 1258 the English gained an advantage over the Welch by means of a treacherous attack upon them at the time they were treating about a peace. Yet the Welch defended themselves with bravery, and killed many of their treacherous assailants.

The Welch again make an offer of peace to king Henry.  
A. D. 1259.

In the year 1259 the Welch again made king Henry an offer of peace, fearing that, when the dissensions then prevailing in England should be pacified, the whole English nation would unite in endeavouring to subdue them, and would then succeed in the attempt, and would treat them with extremest severity. They therefore proposed to buy a peace of them; by giving to the king himself the sum of four thousand marks, or 2666 pounds sterling; three hundred marks, or two hundred pounds, to prince Edward; and

and two hundred marks, or 166 pounds, to the queen. But the king rejected the offer with contempt: and thereupon the Welch resolved to continue the war in their own defence to the best of their abilities.

But the king rejects their offer, and the war goes on.

The intestine troubles of England, known by the name of *the barons wars*, began in a little time after this; during which the king was not at leisure to prosecute the war against the Welch; who were also protected by an alliance they had formed with Simon de Montfort, earl of Leicester, and the barons of his party. In pursuance of this alliance they joined the barons army with a large body of men, of whom a great number was slain in the important battle of Evesham, which was gained by prince Edward over Simon de Montfort and his army in the year 1265, and which ended that civil war.

The civil war, called *the barons war*, breaks out in England.

The Welch join the army of the barons with a large body of men, of whom many are slain at the battle of Evesham.  
A. D. 1265.

In the year 1268 king Henry, being then rid of the opposition of his English barons, marched with a powerful army into Shropshire, with an intent to take an ample revenge upon his enemies in Wales, who had

King Henry marches into Shropshire with a great army, to invade Wales.  
A. D. 1268.

so

But, upon the submission of the Welch to his pleasure, he grants them a peace on the payment of thirty thousand pounds sterling.

Death of K.  
Henry the 3d.  
A. D. 1272.

K. Edw. the 1st  
summons  
Lewellin,  
Pr. of Wales,  
to attend his  
coronation  
and do him  
homage.

so long resisted his authority, and had lately taken part with Simon de Montfort and the other confederate barons against him. But, upon prince Lewellin's sending messengers to treat with him of peace upon such terms as he thought proper to impose, and at the intercession of the Pope's legate, he granted the Welch a peace upon their paying him the very large sum of thirty thousand pounds sterling, and restored to prince Lewellin the possession of four districts of land in Wales, called Cantreds, of which he had some time before deprived him on account of his rebellion. This seems to have been the last publick transaction relative to Wales in the reign of king Henry the 3d, who died in the month of November of the year 1272.

In the beginning of king Edward the 1st's reign prince Lewellin was summoned to attend the ceremony of the king's coronation, as being one of the king's liegemen who ought to do homage to him. But the prince refused to attend this duty. And in a short time after, upon the king's calling a parliament at Westminster, he was again summoned by

by messengers from the king to come to Westminster and perform his homage. But he excused himself from his duty on this occasion upon a pretence of danger to his life, if he went into England, from the wicked designs of some powerful Englishmen against him; and he therefore desired that the king's son and Gilbert de Clare, earl of Gloucester, and Robert Bunsell, the king's chancellor, should be put into his hands, as hostages for his safe return to Wales, in case he obeyed this summons: but did not deny that he owed king Edward homage. King Edward rejected this request of the said hostages with indignation, and went on with the business of the parliament without taking further notice of the Welch prince on that occasion, and passed all those acts which are still extant, and well known to English lawyers under the name of *the Statute of Westminster the first*. But when the parliament was at an end, the king went to Chester, which is on the confines of Wales, and to which it was therefore easy for prince Lewellyn to come without any danger to his person from his enemies in England. And therefore he there



Upon prince  
Lewellin's re-  
peated refus-  
als to do ho-  
mage to king  
Edward for  
his land in  
Wales, the  
king raises an  
army in order  
to expel him  
from it,

Inference  
therefrom.

there sent another summons to Lewellin to attend him and perform his homage. But the prince still refused to obey him: upon which the king drew together an army, and resolved to march into Wales, and expel the prince from the fief, or land, he held under him, since he refused to do him homage for it. *Quo mandatis regis parere detrectante, rex exercitum convocat, disponens principem, sibi denegantem homagium, de feodo suo expugnare.* These are the words of Thomas of Walsingham, an old historian of considerable credit. By these words it is plain that king Edward at this time considered the prince of Wales as his liegeman, or feudatory, and not as an independant prince, and prepared to make war upon him in the former character only. And we have seen by the whole series of the history of the former reigns that, in so doing, he only trod in the steps of his predecessors ever since the time of William the Conqueror, to most of whom the princes, and other great land-holders, of Wales, had done homage for their lands.

King

King Edward accordingly made war upon prince Lewellin; and in the course of a couple of years reduced him to the necessity of suing for peace; which he granted him in the year 1278 upon the following conditions; to wit, 1st, That prince Lewellin should set all those prisoners at liberty without ransom, or demand of any kind, who were in prison for having assisted king Edward, or, in any manner, on account of the war with England; 2dly, That he should pay to the king, for his friendship and favour, the sum of fifty thousand pounds sterling; 3dly, That the four cantreds of land, which he had hitherto enjoyed as his own patrimony, and also all the lands in Wales which the king and his army had conquered in the course of this war, should for ever after belong to the king and his heirs, excepting only the isle of Anglesey, which the king consented to give to prince Lewellin, to be holden of the king and his heirs by the yearly rent of 1000 marks, besides 5000 marks to be paid immediately as a fine for entering into possession of it. And, if prince Lewellin died without heirs of his body, this island was to revert to the

King Edward makes war upon Prince Lewellin with success.

The prince sues for, and obtains, peace from the king. A. D. 1278.

The conditions of the peace,

VOL. II.

T

king,

king, and remain in the possession of him and his heirs for ever after. 4thly, That prince Lewellin should attend king Edward in England at the ensuing Christmas and do homage to him for the said island of Anglesey, which he was to hold of him. 5thly, That all the other land-owners in Wales should do homage for their lands to the king, except five barons in the neighbourhood of Snowdon, the high mountain in South Wales, who should do homage for their lands to prince Lewellin; because, he said, he could not with propriety take upon him the title of Prince, unless he had some barons under him who held their lands of him. But it was agreed that the homages of these five barons should be separated from the crown of England only during the life of prince Lewellin, and after his death should be made to the king of England and his heirs. 6thly, That he should give ten hostages for the performance of these articles. 7thly, That the great men of Wales should bind themselves by an oath to compel prince Lewellin to observe these articles, and to make war upon him for the king of England, if ever he

he should break them, and, after being required by them to redress the breaches he should have made of them, should refuse or neglect to do so. 8thly, That he should be reconciled to his brothers, whom he had treated with severity. These were Owen, his eldest brother, (the eldest son of prince Griffin, his father, who had died in the Tower of London,) and Roderick and David; of whom Owen, the eldest, had been many years a prisoner with his father Griffin in the Tower of London, and had, not long before this war, escaped from thence, and had afterwards been apprehended by his brother Lewellin's order, and together with his brother Roderick, was at this time detained in prison by him. The other brother, David, had fled into England, and taken part with king Edward in this war against Lewellin, and had done the king such acceptable service in it by his valour and activity, that the king thought fit to reward him by a grant of the castle of Denbigh with lands to the amount of a thousand pounds a year, and gave him likewise in marriage, the daughter of the earl of Derby, who had lately lost her former husband.

David, brother to prince Lewellin, having served king Edward in the late war against his brother Lewellin, is rewarded by the king with a grant of Denbigh castle and a marriage with an English lady of distinction.

T 2

In

Owen and Roderick, two other brothers of Lewellin, who had been kept in prison by him, are set at liberty.

Pr. Lewellin himself, with the king's consent, marries a daughter of Simon de Montfort, the late earl of Leicester.

Fresh troubles break out in Wales.  
A. D. 1282.

Hostilities are begun against the English by prince David in a treacherous manner.

In consequence of this pacification (which was made in the year 1278) prince Owen and prince Roderick were set at liberty by their brother Lewellin; and Lewellin married, with king Edward's consent, a daughter of Simon de Montfort, the late earl of Leicester, to whom she had been betrothed in her father's life-time during the alliance between the said earl and Lewellin in the time of the barons war: and the king and queen of England were present at the nuptials.

This peace continued to be observed for about four years, when fresh troubles broke out in Wales by the instigation of prince David, who, notwithstanding the fidelity he had shewn to king Edward in the late war, and the favours he had received from him in return, now ungratefully stirred up his brother, prince Lewellin, and the rest of the great men of Wales, to begin a new rebellion against king Edward. The hostilities were begun by David himself, as an example and encouragement to his countrymen, by suddenly and treacherously laying hands on

Palm-

T

Palm-Sunday, on Roger de Clifford, an English nobleman of great birth and eminence, whom king Edward had appointed to the office of justiciary of all Wales, *tanquam totius Wallie justitiarium*. This great officer was made a prisoner by prince David, and some knights, who were his attendants, and who, though unarmed, endeavoured to defend him against prince David's party, were slain in the scuffle. After this the war was renewed between the Welch and English; and for some time with various success. But at last the event was, that prince Lewellin was killed in a sudden attack made upon him unawares by John Giffard and Edmund de Mortimer, two eminent English barons, at a time when he was at a distance from his main army and had only a small guard to attend him; and his head was cut off and sent immediately to the king, and afterwards, by the king's order, set upon the Tower of London with a crown of ivy on it: and David was taken alive by some of king Edward's partisans, and, by the king's order, tried as a traitor, condemned, and executed, by drawing, hanging, and quartering,

Pr. Lewellin is slain in a sudden attack by two English barons.

Prince David is taken prisoner, and tried and put to death by king Edward as a traitor.

And all Wales is intirely reduced to the king's obedience.

A. D. 1284.

King Edward passes the famous act for the regulation of Wales, called the *Statutum Walliæ*.

His gentle and judicious manner of proceeding on this occasion.

quartering, according to the law of England for the punishment of high treason: and all Wales, with all its strong places, was intirely reduced to the king's obedience, *et tota Wallia, cum omnibus castris suis, subacta est regiae voluntati*. This was in the year 1284; and in the same year, (says Thomas of Walsingham,) the king caused the laws of England to be observed in Wales, and appointed sheriffs for the execution of them, that is, he made the famous statute we have before spoken of, which is called the *Statutum Walliæ*. You are not, however, to understand by this that he instantly abolished all the laws that had hitherto been observed in Wales, and established the laws of England in their stead; for he proceeded in a much gentler and more judicious manner, and, first, inquired from the most able and knowing men in Wales, what were the laws that had till then been observed there, and then, after this information, permitted several of those laws to continue in force among them, and corrected only those that he most disapproved, and introduced the laws of England upon those subjects in their stead. For example;

example; by the Welch law a bastard might succeed to his father's lands as well as a son born in lawful wedlock; and daughters could not inherit their father's lands even when there were no sons; but the lands went over to the next male relations. These two things king Edward changed; excluding bastards intirely from the inheritance of their father's lands; and admitting daughters to it in default of sons, according to the custom of England. But he permitted their custom of inheriting lands, by equal partition amongst all the sons of the deceased owner of them; to continue, though different from the law of England, which gives all the father's lands to the eldest son only, to the exclusion of all the other children. Nor was this English law of inheritance by primogeniture introduced into Wales till 250 years after the reduction of it by king Edward the 1st, when, in order to render its union with England more compleat, and also to avoid the inconveniencies which had been found to arise from the too great subdivisions of lands by repeated partitions of them upon inheritance, king Henry the 8th established it in that country by



by an act of the English parliament. Such was king Edward's temperate and prudent conduct on this occasion. Therefore, when Thomas of Walsingham and the other writers of the history of king Edward the 1st's reign, say, that king Edward on this occasion introduced the laws of England into Wales, they must be understood to mean only that he introduced *some* of the laws of England into it, which he thought most essentially necessary for the peace and happiness of the people, and that he took the whole administration of justice into his own hands, appointing, not only a justiciary of the country, (as his father, king Henry the 3d, had done before him,) but likewise sheriffs in the several counties, by whose means all the executive power of the country was at his disposal.

And thus I have given you a summary account of what the old English historians, and particularly Matthew Paris, (who lived in the reign of king Henry the 3d, and died in the year 1259) relate concerning the connection between England and Wales from the

the time of king William the Conqueror to the final reduction of Wales by king Edward the 1st, and the passing of the *Statutum Walliæ* in the year 1284. You will now judge for yourself whether Wales was, or was not, in a state of feudal dependance on the crown of England during this period, and particularly in the reign of king Henry the 3d, the immediate predecessor of king Edward.

## FRENCHMAN.

I am much obliged to you for this account of the dependance of Wales upon England during that antient period, which, though necessarily of some length, I have not thought in any degree tedious. For it has enabled me to form a clear and positive opinion, that the supposition “that Wales had been a fief of the crown of England,” was not a fiction of king Edward, invented for purposes of policy, as Lord Mansfield conceives it to have been, but a certain and indisputable truth, or, in other words, that the princes, and other great land-holders, of Wales were bound to do homage for their lands to the

Conclusion  
resulting from  
the foregoing  
account of  
Wales.

VOL. II.

U

kings

Of the manner  
in which Wales  
was brought  
into a state of  
feudal subjec-  
tion to the  
crown of Eng-  
land.

kings of England, and usually did do homage for them, in all the reigns from that of the Conquerour to that of king Edward the 1st; (before his last reduction of them,) inclusively. But it seems probable to me from this account, that this obligation of doing homage for their lands arose at first, in the time of king William the Conquerour, or, perhaps, before, from their fear of the power of England, and was not the consequence of their having received their lands originally from the kings of England by grants accompanied with this obligation of doing homage, and performing other feudal duties, to the grantors and their heirs; according to the more customary method of creating feudal subordinations throughout Europe. And this, I imagine, may have induced Lord Mansfield and the learned Mr. Barrington, and perhaps other learned men, to consider Wales as not having been a fief of the crown of England. But they should have recollected that a feudal subjection of one country to another, or rather of the possessor of one country to the possessor of another, may as well arise after a former independency of the one on the other, by a compact

compact between the parties for that purpose; as he originally created before one of the parties is put into possession of the country which he holds of the other party. And many instances may be found of countries which have in this manner become dependent on other countries by a feudal subordination to them, after having been antecedently independent of them. And this seems to have been the case with Wales.

## ENGLISHMAN.

You are certainly right in your conception of the manner in which Wales became dependant upon the crown of England. It must have been by acts of submission of the Welch princes, and other land-holders, to the kings of England, after a prior state of independency on them; because the Welch were the oldest inhabitants of the island, and possessed both Wales and England before the Saxons, or English, arrived in the island and erected those seven kingdoms in it, which, after their union under Egbert, king of the West Saxons, were called *England*, or *the kingdom of England*. And it

is also pretty certain that those acts of submission of the Welch princes, and other land-holders, to the kings of England, whereby they consented to do homage to them for their lands, were the effect of their fear of the power of the kings of England. But, when these acts *were* done, (let the motive that gave rise to them be what it would,) the country of Wales was as truly in a state of feudal subjection to the kings of England, as if it had been a mere uninhabited country, to which no person had any claim, and the kings of England had, first, taken possession of it themselves, and afterwards granted it out in parcels to their friends and favourites to be holden of themselves and their heirs and successors, being kings of England, by homage and military service. And we have seen by the passages above recited from the old writers of the English history, that Wales was in this condition of feudal subjection to the kings of England long before the reign of Edward the 1st. It ought not therefore to be considered as an independant country, which king Edward invaded and conquered for the first time, without any prior claims of superiority over it, as his present

sent Majesty conquered the island of Grenada in the late war: and consequently it can afford no argument one way or the other, concerning the prerogative of the king of England, or Great-Britain, with respect to the government of conquered and ceded countries.

But in truth the *Statutum Walliæ* does not appear to have been made by king Edward's single authority, but by his authority and that of his barons, or great men, conjointly. For we find these words in the pre-amble of it; *Nos itaque . . . volentes prædictam terram nostram Snaudun, et alias terras nostras in partibus illis, sicut et cæteras ditioni nostræ subjectas, . . . sub debito regimine gubernari, et incolas terrarum illarum . . . certis legibus et consuetudinibus sub tranquillitate et pace nostrâ tractari, leges et consuetudines partium illarum hæcenus usitatas coràm nobis et proceribus regni nostri fecimus recitari; quibus diligenter auditis, et plenius intellectis, quasdam ipsarum, de consilio procerum prædictorum, delevimus, quasdam permisimus, et quasdam correximus, et etiã quasdam alias adjiciendas et statuendas decrevimus, et eas de cætero in terris nostris*  
in

The *Statutum Walliæ* was not made by the single authority of king Edward the 1st, but with the advice and concurrence of his barons.

*in partibus illis perpetuâ firmitate teneri et observari volumus, in formâ subscriptâ,—*

By these words, *coràm nobis et proceribus regni nostri*, and *de consilio procerum prædictorum*, it is plain that the *proceres regni*, the great men, or barons, of the realm, concurred with king Edward in enacting this statute: and these barons were the only parliament then in being, the knights, citizens, and burgessees, who compose the House of Commons, not making at that time, nor till about eleven years after, a part of the English legislature. So that, if Wales had hitherto been perfectly independent of the crown of England, and now for the first time reduced to a subjection to it by conquest, (as Lord Mansfield had erroneously conceived,) yet this instance of king Edward's legislation would not have afforded a precedent in favour of the absolute legislative power of the Crown alone over a conquered country. And so we may take our leave of the history of Wales with respect to the present question.

End of the inquiry concerning the condition of Wales, and the legislative authority exercised over it by K. Edw. the 1st.

FRENCH

## FRENCHMAN.

But I think you mentioned some other countries which Lord Mansfield cited as countries which had been conquered by the crown of England, and in which the kings of England had exercised a legislative authority by virtue of their prerogative, and without the concurrence of the parliament. Pray, what countries were those? and what kind of authority have the kings of England exercised in the government of them?

## ENGLISHMAN.

The places mentioned by Lord Mansfield as instances of the exercise of this supposed legislative power of the Crown, are the town of Berwick upon Tweed, the town of Calais on the northern coast of France, the dutchy of Guienne or Gascony, in France, the province of New-York in North-America, and the town of Gibraltar and island of Minorca, which two last places, before the conquest of them by the British arms in the course of queen Ann's war, were a part of the monarchy

Other places mentioned by Ld. Mansfield as instances of the exercise of the sole legislative power of the crown.



Lord Mansfield's words concerning Berwick upon Tweed.

narchy of Spain. Lord Mansfield's words concerning Berwick upon Tweed are these. " Berwick, after the conquest of it, was governed by charters from the Crown, till the reign of James the 1st, without interposition of parliament."

## FRENCHMAN.

A remark upon them.

Is that all that was said about Berwick, to prove that the king had a right of making laws for its inhabitants by his prerogative only, and without the concurrence of parliament? Surely this can never be thought conclusive. For, if it was, it would prove too much;---it would prove that the king had the power of making laws without the concurrence of parliament for the provinces of the Massachusetts Bay, and Connecticut, and Rhode-Island, and Pennsylvania, to all which his predecessors have given charters without the interposition of parliament, as well as to Berwick upon Tweed; and he would also have this power in all the cities and towns in England itself which have charters, those charters having all been given them, (as I have always heard,) by the kings alone

alone without any interposition of parliament. And yet in all these cases it is not pretended that the king alone is possessed of the legislative authority.

## ENGLISHMAN.

I intirely agree with you in thinking the argument for the king's legislative authority derived from the case of Berwick upon Tweed, extreamly inconclusive: and for the reason you have given. The power of giving charters has always been considered as a part of the royal prerogative of the kings of England; but it has never been supposed to involve in it the power of making laws and imposing taxes on the people to whom they have been granted. And I have therefore been as much surprized as you can be, at its having been alledged on this occasion for such a purpose. And; further, in the second year of the reign of king James the 1st, that is, in the year of our Lord 1604, or 171 years ago, there was an act of parliament for the confirmation of even a royal charter, which the king had a little before granted by his letters patent to the mayor,

The privileges of the town of Berwick upon Tweed were confirmed by an act of parliament in the year 1604.

VOL. II.

X

bailiffs,

An inference  
therefrom.

bailiffs, and burgesſes of Berwick, and of the franchiſes, liberties, and customs of the ſaid borough. So that it appears that even that king, (who was remarkably jealous and tenacious of the prerogative of the crown,) did not conceive himſelf to be poſſeſſed of a compleat legiſlative authority over the people of Berwick by virtue of the conqueſt of it by his predeceſſors on the throne of England: becauſe, if he had conceived ſo, he would not eaſily have been prevailed upon to diveſt himſelf of a part of that authority by exerciſing it in conjunction with the Engliſh parliament. This inſtance therefore, of Berwick upon Tweed is of very little weight with reſpect to the preſent inquiry.

## FRENCHMAN.

Of the dutchy  
of Guienne, or  
Gaſcony, and  
the town of  
Calais in  
France.

The next inſtances you mentioned, as having been cited by Lord Mansfield in ſupport of this legiſlative authority of the crown, were, if I remember right, the town of Calais in France, and the dutchy of Guienne, or Gaſcony, in the ſame country. Pray, what did Lord Mansfield ſay concerning theſe places?

ENG-

## ENGLISHMAN.

His words upon these instances were nearly as follows. "Whatever changes were made in the laws of Gascony, or Guienne, and Calais, must have been under the king's authority. For, if they had been made by act of parliament, the acts would have been extant: because they were conquered in the reign of king Edward the third; and all the acts from that reign to the present time are extant. And in some acts of parliament there are commercial regulations relative to each of the conquests which I have named: but there are none that make any change in their constitution and laws.

The words of  
Lord Mansfield  
concerning  
them.

Yet, as to Calais, there was a great change made in their constitution. For they were summoned by writ to send burgeses to the English parliament. And, as this was not done by act of parliament, it must have been done by the sole authority of the king." This is all that Lord Mansfield said concerning Gascony and Calais.

X 2 APPROX FRENCH-

## FRENCHMAN.

Remarks on  
Lord Mans-  
field's words.

Gascony was  
not acquired  
by the kings  
of England by  
conquest, but  
by the mar-  
riage of king  
Henry the 2d  
with Eleanor  
the heiress of  
it.

It is really very surprizing that that learned lord should have spoken in this manner; since, if I remember any thing of the history of those times, the facts were quite different from his state of them. Neither Gascony nor Calais were possessed by the kings of England as conquered countries, or by the right of war and conquest, but by the peaceful titles of marriage and inheritance. This is more espècially true of Gascony, or Guienne. For that was acquired by the marriage of Henry earl of Anjou and Poitou and duke of Normandy, (who was afterwards king of England by the title of Henry the second,) with Eleanor of Guienne, the heiress of that great province, after she had been divorced from the king of France. And it descended to the said Henry's posterity by the said Eleanor, in her right, and was enjoyed by them by that title only for many generations, even till the latter part of the reign of king Henry the 6th, when the English lost all their possessions in France of every kind, except Calais and a small territory adjoining to it. The right of conquest was never thought of during

during all that time as the ground of the possession of this province by the kings of England: for no contest had ever arisen about it; but the kings of England had been always allowed to take and keep peaceable possession of it by virtue of their hereditary title from the said Eleanor. Whatever, therefore, was done by the kings of England who possessed this province, (that is, by king Henry the 2d and his successors down to king Henry the 6th inclusively,) in the way of government, or legislation, in this province, or dutchy, of Guienne, or Gascony, has no more to do with their authority over conquered countries by virtue of their royal prerogative as kings of England, than the acts done by the kings of England of the present royal family in their German dominions of Hanover and Zell in their capacity of dukes of those countries; which no one, I presume, would ever think of alledging as proofs of the king's authority over conquered countries. And therefore this instance of Guienne, or Gascony, ought not, as I conceive, to have been mentioned on the subject we are now considering.

As

Calais was a part of king Edward the 3d's maternal inheritance, and not a part of the dominions of the crown of England.

As to Calais indeed, it is true that it was conquered by the arms of England in the reign of king Edward the 3d, as Lord Mansfield asserts. But it is also true, that it was not conquered for England, or by virtue of any right inherent in the crown of England. It was claimed and seized on by the said king Edward, as a part of the kingdom of France, the whole of which that king claimed as his right inheritance through his mother Isabel, who was a daughter of one of the kings of France. This was a right, that was no way connected with his possession of the crown of England, but which would equally have belonged to him if he had not been king of England, as might easily have happened on the following supposition. Let us suppose that Edward the 2d, king of England, had married two wives, and that Isabel of France had been his second wife; and that he had had sons by his first wife, as well as his son Edward (who was afterwards king of England by the title of Edward the 3d) by Isabel, his second wife. In such a case it is evident that king Edward the 2d's eldest son by his first wife would have succeeded to the crown

of

of

of England, and Edward, his eldest son by his second wife Isabel, would have had the right of his mother to the crown of France, though he would not have been king of England: which shews that the title of King Edward the 3<sup>d</sup> to the crown of France was totally unconnected with his right to the crown of England. Consequently, in whatever manner he governed the kingdom of France, his maternal inheritance, or the town of Calais, (which was, if I remember right, the only part of that inheritance which he was able to keep for any length of time,) it had nothing to do with the right, or prerogative, of a king of England over a mere conquered country, to which the king, who should have conquered it, had no other claim at all but that of conquest.

#### ENGLISHMAN.

I intirely agree with you in thinking these two instances of Gascony and Calais quite foreign to the present question; and for the reasons you have given; they having been possessed by the kings of England by right  
of



Of the privilege given to Calais to send members to the English parliament.

of marriage and inheritance, and not by right of conquest. And, as to what Ld. Mansfield adds, that, when the burgessees of Calais were empowered to send members to the English parliament, this privilege was given them by the king alone, and not by act of parliament, it seems to me to afford no sort of argument for supposing (as Ld. Mansfield seems to do) that, before this privilege was granted them, they had been governed by the authority of the Crown alone without the concurrence of parliament; because, if this reasoning were allowed, it would prove that many places in England itself had been subject to the sole legislative authority of the Crown till the reigns of king Edward the 6th, queen Mary, queen Elizabeth, and king James the 1st; since it is well known that those sovereigns did, of their own authority, and without the interposition of parliament, authorize those places to send members to the English parliament; though, (happily for the nation,) the power of granting such a privilege to other boroughs, is now no longer understood to be a part of the royal prerogative. But indeed, as you have justly observed, if king  
Edward

Edward the 3d and his successors did govern Calais by their own authority only, and without the concurrence of parliament, until they permitted them to send members to the English parliament; (and whether they did or not, is more than Lord Mansfield has told us, and more than I can tell, not having particularly inquired into the matter.) it would only prove that he governed the kingdom of France, his maternal inheritance; that is, that little part of it of which he kept possession, in a different manner from the kingdom of England, his paternal inheritance, with which the former kingdom had no connection but that of accidentally being subject to the same king.

But indeed the instance of Calais seems to me rather to furnish a ground for a conjecture that is adverse to the doctrine of the sole legislative authority of the kings of England over countries obtained by conquest. What I mean is this. Calais was possessed by the kings of England by virtue of king Edward the 3d's hereditary claim to the whole kingdom of France. From the reign of king

The conduct of the kings of England with respect to Calais is rather adverse to the doctrine of the sole legislative power of the Crown over conquered countries.

VOL. II.

Y

Edward

Edward the 3d to that of king Edward the 4th, the kings of England endeavoured to make good this claim by force of arms. And, even for some years after Edward the 4th's reign, the memory of the wars in France, (which had taken their rise from this claim,) was fresh in the minds of the English nation, and the inclination to renew those wars; and again endeavour to establish that claim, was still alive. At last this design seems to have been quite laid aside, though the claim itself has never been formally given up even to the present day; but our kings still style themselves kings of France. The design of recovering the kingdom of France by force of arms seems, however, to have at last been laid aside, but not before the reign of king Henry the 8th, who, we must observe, was the very king that gave the people of Calais the privilege of sending members to the English parliament. So that just at the time when Calais might seem to be no longer possessed by the kings of England by virtue of their hereditary claim to the crown of France, that claim being no longer pursued;—and consequently

just at the time when Calais might appear to be retained by the kings of England as a mere appendage of the crown of England, without regard to the former hereditary title ;—king Henry the 8th, (a prince who was by no means disposed to lessen his own royal prerogative,) thought fit to incorporate Calais with the Kingdom of England, by empowering its inhabitants to send members to the English parliament, and consequently to permit the parliament to partake with him in the power he had before enjoyed alone (if he did in truth enjoy the said power) of making laws and imposing taxes on them. From this proceeding I should be inclined to draw this conclusion, that, whenever a country becomes an appendage to the crown of England, so as to be possessed by the kings of England as kings of England; or merely *because* they are kings of England; the parliament of England ought to participate with the king in the exercise of the legislative authority over such country. But I lay no great stress on this argument, which is certainly doubtful and conjectural. All I pretend to be clear in with respect to this

instance of Calais is, that it affords no kind of ground for any inference in favour of the sole legislation of the crown over conquered countries.

### FRENCHMAN.

Of the province of New-York in North-America.

I think you mentioned New-York amongst the instances which Lord Mansfield produced as proofs of the legislative authority of the crown alone, without the concurrence of parliament, over countries acquired by conquest. Pray, what did his lordship say with respect to this instance? For, if the province of New-York was considered as a conquered country, and was, upon that account, governed by the king's single authority for any considerable length of time, without the interposition of the English parliament or an assembly of its own inhabitants, I should esteem it to be a much more respectable precedent in favour of the royal prerogative in question, than either Gascony, or Calais, or Berwick, or even than Ireland and Wales; if those countries and places had really been, (what we have sufficiently seen they were not,) fair proofs of the existence of such a legislative

legislative power in the crown in former times: because, as New York is a part of America, and was acquired by the crown of England but little above a hundred years ago, it bears a nearer resemblance to the case of the island of Grenada, and the constitution of the English government at the time it was acquired by the crown of England (which, as I have heard, was in the reign of king Charles the second,) bears a greater resemblance to the constitution of England at this day, than is to be found in the case of those old examples; and consequently there would be a better ground for inferring from the exercise of such a legislative authority by the crown alone over the said province, after king Charles's acquisition of it, a continuance of the same authority over the countries that have been lately acquired by the crown by conquest (such as Canada and Grenada,) until his Majesty thought fit to divest himself of it by his proclamation of the 7th of October, 1763. I am therefore very desirous of knowing what Lord Mansfield said concerning this important instance of New-York.

ENG-

## ENGLISHMAN.

The case of New-York would indeed be a very important precedent, if it were true that that province had been a conquered country, and had been considered as such by king Charles the 2d, who dispossessed the Dutch commonwealth of it, and that, after having conquered it from the Dutch, king Charles had enjoyed and exercised a permanent legislative authority over it, without the interposition of either the English parliament, or an assembly of the freeholders of the province itself. But this was far from being the case; as you will presently perceive, when you have heard a short account of the taking of New-York from the Dutch, and the manner in which it was governed for the first twenty, or five and twenty, years after that event. As to what Lord Mansfield said upon the subject, it was contained in these few words. "After the conquest of New-York, in which most of the old Dutch inhabitants remained, king Charles the 2d changed their constitution and political form of government, and granted it to the duke

Lord Mansfield's words concerning the said province.

“ duke of York, to hold from his crown  
 “ under all the regulations contained in his  
 “ letters patent.”

## FRENCHMAN.

I perceive by these words, that Lord Mansfield supposes New-York to have been a conquered country, and to have been considered as such, and grounds his argument in favour of the legislative authority of the crown upon that circumstance. And, to confess the truth, I had always conceived the fact to be so; that is, that New-York had been originally a Dutch settlement, and had been conquered from that commonwealth by the arms of England in the reign of king Charles the 2d, and had been always considered by the crown of England in the light of a conquered country, and as belonging to it by no other title whatsoever. I should therefore be glad to be set right, if this notion of the matter is a mistaken one.

An inquiry whether, or no, New-York was a conquered country.

END



## ENGLISHMAN.

In the view of an impartial historian and philosopher the first part of what you have conceived upon this subject may, perhaps, be true; that is, that New-York was really at first a Dutch settlement, justly belonging to the Dutch commonwealth, till it was conquered from them by the arms of England in the year 1664 in the beginning of the first Dutch war in the reign of king Charles the second; though even this is not absolutely certain. But it is not true that king Charles the second, or the English nation in general, considered the matter in that light. For it is certain, on the contrary, that they considered the provinces of New-York and New-Jersey (which then were both possessed by the Dutch, and known by the name of the *New Netherlands*;) as a part of New-England, and as having always belonged to the crown of England; ever since the planting of New-England, as much as the rest of New-England, in which the English had actually made settlements. And they accordingly considered the Dutch inhabitants of that country as having

- This province was not considered by king Charles the second as a conquered country, but as a part of the more antient English colony of New-England.

having settled themselves upon English ground without authority and contrary to justice, and as being therefore justly liable to be expelled from their settlements whenever the English government should think proper, unless they would surrender themselves to the English government and consider themselves as subjects of England. This opinion had been entertained in England and in the English colonies in New-England before the restoration of king Charles the second ; and Richard Cromwell, (who had succeeded his father Oliver as protector of the commonwealth of England,) had even taken some steps towards accomplishing a design that had been entered into for the reduction of that country to the obedience of the English government. How far these pretensions of the English were well founded, I will not pretend to determine. But that these were their pretensions, and that king Charles the second claimed the country upon that ground, and upon that ground only, will appear beyond a doubt from the following extract of a letter, which colonel Nicholls, (the commander of the armament which king Charles sent out, in

VOL. II.

Z

the

the summer of the year 1664, to recover the country from the hands of the Dutch commonwealth,) sent the Dutch governours of the country (who resided in the island of New-York, then called *Manhattans*,) in answer to a demand which they had made to him of the reason of his hostile approach towards them; which had very naturally seemed strange to them, as the war between England and Holland was not yet begun.

Colonel Nicholls's letter to the Dutch governours of the said province, requiring them to surrender it to king Charles the 2d.

A.D. 1664.

“ To the Honourable the Governours and  
“ Chief Council at the *Manhattans*.

“ Right worthy Sirs,

“ I Received a letter by some worthy persons

“ intrusted by you, bearing date the <sup>19</sup>/<sub>30</sub> of

“ August, desiring to know the intent of

“ the approach of the English frigates: in

“ return of which, I think it fit to let you

“ know, that his Majesty of Great-Britain,

“ *whose right and title to these parts of Ame-*

“ *rica is unquestionable*, well knowing how

“ much it derogates from his crown and

“ dignity to suffer any foreigners, (how near

“ soever they be allied) to usurp a dominion,

“ and,

“ and, without his Majesty’s royal consent;  
 “ to inhabit in these or any other of his  
 “ Majesty’s territories, hath commanded me,  
 “ in his name, to require a surrender of all  
 “ such forts, towns, or places of strength,  
 “ which are now possessed by the Dutch  
 “ under your commands. And, in his Ma-  
 “ jesty’s name, I do demand the town situate  
 “ on the island commonly known by the  
 “ name of *Manhattoes*, with all the forts  
 “ thereunto belonging, to be rendered unto  
 “ his Majesty’s obedience and protection;  
 “ into my hands, &c.”

The city situated on the island of *Man-  
 battoes*, or *Manhattans*, was then called  
*New-Amsterdam*, and since that time *New-  
 York*.

The said city and the country belonging to it  
 were surrendered by the Dutch governours to  
 colonel Nichols soon after this letter of sum-  
 mons.

The said  
 country was  
 accordingly  
 surrendered to  
 Col. Nicholls.

You will allow, I believe, that it is plain  
 from the foregoing letter that king Charles  
 the second did not consider this country as  
 the property of the Dutch commonwealth

Conclusion!  
 following  
 from the said  
 letter and sur-  
 render.

and an object of conquest, properly so called; notwithstanding the great number of Dutch inhabitants who continued in it, but as a part of his own dominions; of which the Dutch had surreptitiously and unjustly taken possession, and from which it was therefore both just and necessary to expel them. And, accordingly, he had, before this expedition of colonel Nichols against this country, (which was destined to recover the possession of it to the crown of England) made a grant of it, by letters patent under the great seal of England, to his brother the duke of York; (who was afterwards king of England by the title of James the 2d,) as being a tract of land that already belonged to him, before ever colonel Nichols sailed from England. Surely, after this conduct of the crown with respect to this province, it can never be considered as a conquered country *to any legal view or purpose*, and consequently cannot justly be alledged as an example, or precedent, of the prerogative of the crown of England with respect to conquered countries.

FRENCH,

## FRENCHMAN,

It certainly cannot: and; whatever was the manner in which king Charles governed it after he had got possession of it, -- whether he made laws for it with, or without, the concurrence of his parliament, or an assembly of the people; --- it can have no relation to the question we are now discussing concerning the prerogative of the crown with respect to conquered countries. I therefore do not wish to know the further history of this province with any view to throw light upon that question. But yet I should be glad to be informed of it on another account; and that is, to see how far the kings of England have at any time assumed and exercised a legislative authority over any of the out-lying dominions of the crown, that have been settled, or planted, by colonies from England; which is certainly the true legal view in which New-York ought to be considered. For I think I have sometimes been told, that the kings of England had, upon some occasions, pretended to a greater degree of legislative power over the remote and distant dominions of

Of the legislative authority claimed by the crown over colonies planted by Englishmen.

of the crown, though settled by colonies from England; than over the kingdom of England itself. I should therefore be glad to know in what manner the province of New-York was governed, after it had been surrendered to the crown of England upon the invasion of colonel Nichols.

## ENGLISHMAN.

The Crown has formerly claimed a compleat legislative authority over all the English colonies in the world.

King Charles the 1st appointed commissioners to exercise this legislative authority over them all, in the year 1636.

I believe that some such pretensions, as you speak of, to a higher degree of legislative power over distant colonies of Englishmen than over the inhabitants of England itself, may have been made by the crown in former reigns, and more especially in the reigns of the Stuarts. And indeed there is extant a famous instrument of this kind in the reign of king Charles the 1st, by which that king appointed commissioners to make laws and ordinances for the government of all the English colonies all over the world. This instrument was passed under the great seal of England in the year 1636, which was the time of the most arbitrary government of that misguided monarch. It appointed twelve persons

persons of note, (who were, all of them, members of the king's privy council, and most of them great officers of state,) to be the king's commissioners for the following general purpose, to wit, *ad regimen et tutamen dictarum coloniarum deductarum, vel quæ gentis Anglicanæ in posterum fuerint in partibus hujusmodi deductæ*; and gave them a power of establishing *leges, constitutiones, et ordinationes, seu ad publicum coloniarum illarum statum, seu ad privatam singulorum utilitatem pertinentes, eorumque terras, bona, debita, et successionem in iisdem partibus concernentes*;—*ac qualiter invicem et erga principes externos eorumque populum, nos etiã et subditos nostros tam in partibus exteris quibuscunque quàm in mari, in partes illas, vel retrò, navigando, se gerant*;—*vel quæ ad sustentationem cleri, exercentis regimen vel curam animarum populi in partibus illis degentis, congruas portiones in decimis, oblationibus, aliisque proventibus, designando, spectant*;—*juxtà sanas discretiones suas, et habito consilio duorum vel trium episcoporum (quos ad se convocandos duxerint necessarios) in ecclesiasticis*;—*et clero portiones designandi, condendi, faciendi, et edendi*:—

Extracts from the commission given to the said commissioners.

ac



*ac in legum, constitutionum, et ordinationum illarum violatores pœnas et multas, impositionem, incarcerationem, et aliam quamlibet coercionem, etiam, (si oporteat, et delicti qualitas exegerit,) per membri vel vitæ privationem, infligendas providere ; &c.* Here you see the crown undertook to delegate to its commissioners a compleat legislative power over all the English colonies in America. For it was a power of making laws and ordinances relating either to the publick condition of those colonies or to the private advantage of the individuals who composed them ;---and to the behaviour of the colonies one to another, and to foreign states ;---and to their behaviour towards the king and his other subjects, either in foreign countries, or on the high seas, in going to, or coming from, their settlements ;---and to the maintenance of the clergy who exercise the cure of souls in the said settlements, by ordering the inhabitants of those colonies to make them reasonable allowances of tythes, or offerings, or some other competent revenue ;---it was a power of making laws upon all these subjects, and of inflicting such punishments as they

Powers delegated by the said commission.

they should think fit (not excepting even the loss of life or limb, in cases where they should judge it necessary,) on those who should disobey the said laws and ordinances: which is as large and general a legislative power as can well be conceived. The next branch of the commission gives the commissioners a power to place and displace the governors of the American colonies at their discretion, and to call them to account for their misconduct in their government, and to punish them for the same either by fines, or mulcts, to be levied upon their property in the colonies of which they have been governors, or by removing them from their governments, or by other methods according to the degree of their guilt, *vel aliter, secundum quantitatem delicti, asfigura*. It also gives them a power to appoint judges in all sorts of causes, and of erecting courts of justice of all kinds, for the determination of civil and criminal matters, and for the decision of ecclesiastical causes; and of appointing the modes of proceeding in the said courts. And then follows a proviso, which ordains that the laws and ordinances which

VOL. II.

A a

these

A remarkable proviso in the said commission.

these commissioners shall make in the said colonies by virtue of the authority thereby given them, shall not take effect till they have received the king's own assent in writing, testified at least under the royal signet, if not under the great, or privy, seal; but which declares that, after they have so received the said royal assent, they shall have the full force of laws, and be obeyed by all the persons whom they concern. This proviso is expressed in these words: *Provisum tamen, quod leges, ordinationes, et constitutiones hujusmodi executioni non mandentur, quasque assensus noster eisdem adhibeatur regius in scriptis sub signetto nostro signatis ad minus. Et hujusmodi assensu adhibito, eisque publice promulgatis in provinciis in quibus sint exequenda, leges, ordinationes, et constitutiones illas plenarie juris firmitatem adipisci, et ab omnibus, quorum interesse poterit, inviolabiliter observari, volumus et mandamus.* The remaining part of the commission gives the commissioners a power to hear and determine complaints against particular colonies, or the governours of them, and disputes between colony and colony concerning encroachments on each other's

other's territories, or other injuries, and, after having heard such complaints, to order either the governours of any of the colonies, or the whole colonies themselves, to come back to England or to remove to such other places as the said commissioners shall allot to them for their habitation : and lastly, to inspect and examine all the charters which the king, or any of his predecessors, may have granted to any of the said English colonies ; and, if they shall find either that they have been surreptitiously or unduly obtained, or that the privileges granted by them are prejudicial to the king and the rights of his crown, or to foreign princes, to revoke and annull them.

These were the contents of this famous commission of king Charles the 1st, by which we plainly see his notions of colony-government. But, I presume, he was as much mistaken in these notions as in his conceptions of the rights of his crown over his subjects in England itself, where his misgovernment was attended with such fatal consequences. So that nothing ought to be

A remark on  
the above-said  
commission.

A a 2                      inferred

inferred from his opinions, or practices, in this bad part of his reign (when he governed England itself without a parliament,) concerning the just and legal prerogatives of the crown of England even at that time, and much less concerning those which exist at this day, when the liberties of the people are both better known and ascertained, and also extended further, and more firmly established, than they were in the reign of that king.

Names of the persons to whom the said commission was granted.

The persons to whom the aforesaid commission was granted were these; Dr. William Laud, the cruel and mischief-making archbishop of Canterbury, who was the adviser of most of the unhappy measures that occasioned the civil war that broke out a few years after between the king and parliament; the lord Coventry, lord keeper of the great seal; the archbishop of York; Dr. William Juxon, the bishop of London, who was at that time lord treasurer; Henry Montague, earl of Manchester, the keeper of the privy seal; Thomas Howard, earl of Arundel and Surrey, the earl-marshall of England; Edward Pierpoint, earl of Dorchester, chamberlain to the queen;  
Sir

Sir Francis Cottington, lord Cottington, chancellor and under-treasurer of the Exchequer, and master of the court of Wards and Liveries; Sir Thomas Edmonds, knight, the treasurer of the king's household; Sir Henry Vane, (the elder,) knight, the comptroller of the king's household; and Sir John Coke, knight, and Sir Francis Windbank, knight, the king's two principal secretaries of state. Any five, or more, of them might execute the powers of the commission. This mode of governing the colonies continued about six or seven years, that is, till the ensuing civil war, which began in the year 1642. In the following year 1643, the parliament, at Westminster, who conducted the war against king Charles the 1st, took upon them to supersede this commission, and appointed, by one of their ordinances, (made without the king's concurrence) a committee of persons of their own choice for regulating the plantations; and made Robert Rich, earl of Warwick, who acted as admiral of the English nation under the authority of the parliament, the governour in chief of them all; they considering the plantations as a proper appendage to the marine department. And by

Of the government of the American colonies during the civil war.

Of the govern-  
ment of them  
in the time of  
the common-  
wealth of  
England.

by this committee the plantations seem to have been governed till the year 1650, when England was governed under the form of a commonwealth, without either king or house of lords, by a remnant of that famous house of commons which had made war against the king. The only civil authority then in being in England was vested in the said remnant of the house of commons, (which was then called *the Parliament of the Commonwealth of England*, and possessed the whole legislative authority of the state;) and in a council of state, appointed by the said parliament, who were entrusted with all the executive power. And in this year, 1650, an act was passed by the said republican parliament, which vested the government of the plantations, in a great degree, in the said council of state. What further changes happened in the government during the usurpation of Oliver Cromwell and his son Richard, (who were called *Protectors* of the commonwealth) and the subsequent year of anarchy and confusion, before the return of king Charles the 2d in 1660, I do not exactly know, nor think it material to inquire.

quire. But after the said return, (which is commonly called *the Restoration*,) there was no attempt made by the king to revive the aforesaid legislative commission, which had been granted by king Charles the 1st, nor, in any other form, to assume and exercise a legislative authority over the American colonies by virtue of the royal prerogative only, and without the concurrence of parliament: but the famous navigation-act, and many other acts of parliament were passed, after that period, concerning the said colonies, by the king and parliament conjointly, in the same manner as with respect to the kingdom of England itself. It seems reasonable therefore to conclude that, ever since the restoration in 1660, the kings of England themselves, as well as their subjects, have been of opinion that they were not authorized by virtue of their royal prerogative alone, to make laws for their subjects in the American plantations; but that such laws could only be made by them in concurrence with the parliament of England, or with the assemblies of the freeholders of the several plantations for which they were to be made.

Of the government of them after the Restoration.

Conclusion concerning the right of legislation over the American colonies since that time.

This



The kings of England seem, even after the Restoration, to have claimed a right of legislation over new colonies, in which no assemblies of the people had yet been established.

This seems to have been the case with respect to the more ancient American plantations, in which assemblies of the people had been established, such as the plantations of New England and Virginia, and Barbadoes, and the Leeward islands. For, with respect to such plantations as had been lately acquired, or recovered, and in which assemblies had not yet been established, the kings of England, after the restoration, seemed still to claim a right of making laws for the inhabitants of them (by their single authority, or without the concurrence of parliament, with respect to their internal government, and domestick concerns, though they acted in conjunction with the parliament in making such laws, as related to the regulation of their trade, in comparison with the trade of the other colonies in America. At least king Charles the 2d seems to have claimed and exercised this prerogative. For, if I am rightly informed, he governed Jamaica in this manner from the year 1660 to the year 1681, that is, by a governor and council only, without an assembly of the freeholders of the island: which governor and council were nominated by

of the king  
of England  
to the  
governor  
and council  
of the  
said colony  
of Jamaica  
in the  
year 1660  
and 1681

by the king, and exercised a legislative power over the inhabitants of Jamaica, though they were almost all English settlers, the Spaniards having, for the most part, abandoned the island soon after the conquest of it in the year 1655 during Oliver Cromwell's protectorship. All the first laws enacted in Jamaica were enacted, (as I have heard,) by the governour and council only: and, (as I suppose) there must likewise have been some taxes imposed upon the inhabitants, for the support of their internal government, by the same authority. But in the year 1681 an assembly of the people was called, who concurred with the governour and council in the exercise of the legislative power. And this mode of government has continued in that island ever since. This, I have been told, was the case in Jamaica from the year 1660, (in which king Charles the 2d took possession of his father's throne,) to the year 1681; but I am not quite certain about it, not having met with any distinct account of it in any book of note. But, with respect to the province of New-York, I can speak with greater certainty, from the authority of Mr. William Smith, the great lawyer

The island of Jamaica was governed by the king's single authority, without an assembly of the people, from the year 1660 to the year 1681.

The province of New-York was governed in the same manner by the duke of York's deputies from the year 1664 to the year 1683.

VOL. II.

B b

of

of that province, who has published a faithful and instructive history of it. And here it appears that king Charles the 2d claimed a right to the same legislative authority, and delegated it to his brother, the duke of York. For in the grant the king made to the duke of the whole province, together with the adjoining country since called New-Jersey, he included the powers of government as well as the property of the soil; and, in pursuance of this grant, the duke of York governed it for several years by his single authority, without summoning an assembly of the freeholders. This authority he, for the most part, exercised by deputy, that is, by a governor and council, whom he appointed for the government of the province. Colonel Nichols, who recovered the country from the hands of the Dutch, was the first governor of it under the duke of York: and the title, under which he took upon himself the government of it, was that of *deputy-governour, under his royal highness the duke of York, of all his territories in America.*

Col. Nichols was the first governor of it under the duke of York.

This

This colonel Nichols was a man of great prudence and moderation, and governed his new-acquired territory of New-York for near a twelvemonth before he received the news of the declaration of the war that had broke out between England and Holland, the said news not reaching him before the month of June, 1665 : which I mention as a confirmation of what I before observed, that this province was not considered by the English nation as a country acquired by right of war, but as a country recovered from the unjust possession, or usurpation, of a foreign state. This country remained in the possession of the English all that first Dutch war, that is, till the peace of Breda in July, 1667, and was left in their possession by that treaty. Colonel Nichols continued governour of it, under the duke of York, during the greatest part of this period, namely, till the month of May, 1667, when he was succeeded in that office by colonel Francis Lovelace.

He was succeeded by colonel Lovelace in May, 1667.

This colonel Lovelace was likewise a man of great moderation ; and the people lived peaceably under him till the country was

B b 2 . . . again

The province  
was conquer'd  
by the Dutch  
in the year  
1673;

but restored to  
the crown of  
England at  
the peace in  
1674.

again reduced to the obedience of the States of Holland in the year 1673, which was the second year of king Charles the 2d's second Dutch war. But this Dutch dominion did not continue long, the country being restored to the crown of England by the treaty of peace, which was concluded between England and Holland in the following year, 1674.

The king  
makes a new  
grant of it to  
the duke of  
York in June,  
1674.

Maj. Andros  
is appointed  
governour of  
it under the  
duke.

He is succeed-  
ed by colonel  
Dongan in  
August, 1683.

Upon the conclusion of this peace the duke of York, to remove all doubts that might be entertained concerning his property in this country, (which had thus been conquered by the Dutch, and restored to the crown of England,) obtained a new grant of it from king Charles, dated the 29th of June, 1674, and, two days after, commissioned *Major Edmund Andros* (who was afterwards better known by the title of *Sir Edmund Andros*) to be governour of his territories in America. He was a man of a tyrannical disposition, and made himself odious to the people under his government. However, he continued in the office till the 27th of August, 1683, when he was succeeded in it by colonel  
Thomas

Thomas Dongan, who had been appointed to it by the duke of York in the preceding month of September, 1682.

This colonel Dongan, Mr. Smith says, was a man of integrity, moderation, and genteel manners, and, though a professed papist, may be classed among the best governors of that province. Mr. Smith then proceeds as follows. " The people, who " had been formerly ruled at the will of the " duke's deputies, began their first participation in the legislative power under colonel " Dongan: for shortly after his arrival, he " issued orders to the sheriffs to summon the " free-holders for chusing representatives to " meet him in assembly on the 17th of " October, 1683. Nothing could be more " agreeable to the people, who, whether " Dutch or English, were born the subjects " of a free state. Nor indeed was the change " of less advantage to the duke than to the " inhabitants. For such a general disgust had " prevailed, and in particular in Long island, " against the old form which Col. Nichols " had introduced, as threatened the total " subversion

Col. Dongan summons an assembly of the freeholders, in October, 1683.

“ subversion of the publick tranquillity.  
 “ Colonel Dongan saw the disaffection of  
 “ the people at the east end of Long island ;  
 “ (for he landed there on his first arrival in  
 “ the country ;) and, to extinguish the fire  
 “ of discontent, then impatient to burst out,  
 “ gave them his promise *that no laws or rates*  
 “ *for the future should be imposed but by a*  
 “ *general assembly.* Doubtless this alteration  
 “ was agreeable to the duke’s orders, (who  
 “ had been strongly importuned for it,) as  
 “ well as acceptable to the people : for they  
 “ sent him soon after an address, expressing  
 “ the highest sense of gratitude for so bene-  
 “ ficial a change in the government. It  
 “ would have been impossible for him much  
 “ longer to have maintained the old model  
 “ over free subjects, who had just before  
 “ formed themselves into a colony for the  
 “ enjoyment of their liberties, and had even  
 “ solicited the protection of the colony of  
 “ Connecticut, from whence the greatest  
 “ part of them came.”

The petition to the duke of York, by which  
 he had been strongly importuned (as this  
 author expresses it) to consent to this altera-  
 tion

tion of the government of the province, was made by the council of the province, the aldermen of New-York, and the justices of the peace at the court of assize on the 29th of June, 1681, and contains many severe reflections upon the tyranny of Sir Edmund Andros.

From the year 1683 to the present time the legislative power of the province of New-York has been uniformly exercised by the governor, council, and assembly of the freeholders, without any attempt in the governor and council to exercise it without the assembly.

From the year 1683 the province has been governed by a governor, council, and assembly.

Upon the death of king Charles the 2d the duke of York, his brother, succeeded to the crown of England by the title of James the second, and consequently both the property, or immediate lordship, of the province of New-York and the powers of government over it, became again vested in the crown, as they had been before the grant made of them by king Charles the 2d to the duke of York. And they have continued vested in the crown  
ever

Since the accession of K. James the 2d to the crown the said province has been a royal government.



ever since; so that now, and ever since the accession of James the second to the crown, (which was in February, 1684<sup>5</sup>) the appointment of the governour and council, and other officers of government, in this province, has belonged to the crown, and the province has been a royal government.

Mr. Smith informs us farther concerning the government of the province from the first surrender of it to the meeting of the first assembly of the freeholders in the year 1683, in the words following.

Of the laws passed at New-York before the establishment of an assembly of the people.

“ From the surrender of the province to  
 “ the year 1683, the inhabitants were  
 “ ruled by the duke’s governours and  
 “ their councils, who, from time to time,  
 “ made rules and orders, which were  
 “ esteemed to be binding as laws. These,  
 “ about the year 1674, were regularly  
 “ collected under alphabetical titles; and  
 “ a fair copy of them remains amongst  
 “ our records to this day. They are com-  
 “ monly known by the name of *The*  
 “ *Duke’s*

They were called *The Duke’s Laws*.

" *Duke's Laws*. The title-page of the  
 " book, written in the old court-hand, is  
 " in these bald words:

J U S  
 NOVÆ EBORACENSIS,  
 V E L,  
 LEGES AB ILLUSTRISSIMO PRIN-  
 CIPE JACOBO,  
 DUCE EBORACI ET ALBANÆ, &c.,  
 INSTITUTÆ ET ORDINATÆ,  
 AD OBSERVANDUM IN TERRITO-  
 RIIS AMERICÆ;  
 TRANSCRIPTÆ  
 ANNO DOMINI  
 M D C L X X I V.

" Those acts, which were made in 1683,  
 " and after the duke of York's accession to  
 " the throne, when the people were admitted  
 " to a participation of the legislative power,  
 " are, for the most part, rotten, defaced, or  
 " lost. Few minutes relating to them remain  
 " on the council-books, and none in the  
 " journals of the house of assembly."

Of the laws  
 passed in the  
 province of  
 New-York  
 from the year  
 1683 to the  
 Revolution in  
 1688.

VOL. II.

C c

The

Of the first  
assembly of  
New-York  
after the Re-  
volution.

The first assembly after the great and happy revolution in England in 1688, was called by colonel Henry Sloughter, who was appointed governour of New-York by king William and queen Mary. It began on the 9th of April, 1691. And Mr. Smith tells us, that all laws made in the province of New-York antecedent to this period, are disregarded both by the legislature and the courts of law. And that in the collection of the acts of the legislature of the province of New-York published in 1752, the compilers were directed to begin at that assembly. And he adds that the validity of the old grants of the powers of government, in several American colonies, is very much doubted in the province of New-York.

A remarkable  
resolution of  
the said as-  
sembly.

Mr. Smith also relates that in this important year 1691, the house of assembly of the province of New-York, before they proceeded to pass any new acts, unanimously resolved as follows; to wit, " That all the  
" laws consented to by the general assembly  
" under James, duke of York, and the  
" liberties and privileges therein contained,  
" granted

“ granted to the people, and declared to be  
 “ their rights, not being observed, nor ra-  
 “ tified and approved by his royal highness  
 “ nor the late king, are null and void, and  
 “ of none effect. AND ALSO, the several  
 “ ordinances made by the late governours  
 “ and councils, being contrary to the consti-  
 “ tution of England and the practice of the  
 “ government of their Majesties other plan-  
 “ tations in America, are likewise null and  
 “ void, and of no effect, or force, within  
 “ this province.” The latter part of this  
 resolution shews plainly that it was the opi-  
 nion of this assembly that the duke of York  
 had not been legally possessed of the legisla-  
 tive authority which he had exercised over  
 the province of New-York by his governours  
 and councils before the year 1683.

Mr. Smith tells us further, that it has,  
 more than once, been a subject of animated  
 debate, whether the people of the province  
 of New-York *had a right* to be represented  
 in assembly, or whether it be a privilege  
 enjoyed through the grace of the Crown;  
 and that a memorable act of assembly was  
 C c 2 passed

A memorable act of the governour, council, and assembly of New-York in the year 1691, containing a declaration of their rights.

It was afterwards disallowed by K. William in the year 1697.

Conclusion drawn from the foregoing account of the government of the provinces of America.

passed by the governour, council, and assembly of New-York in this famous session in the year 1691, which virtually declared in favour of the former opinion, and which contained several other declarations of the principal and distinguishing liberties of Englishmen, being intitled, "*An act declaring what are the rights and privileges of their Majesties subjects inhabiting within their province of New-York.*" But Mr. Smith adds that it must, nevertheless, be confessed that king William was afterwards pleased to repeal that law in the year 1697.

It seems therefore to have been the opinion of the kings of England, even since the Revolution, that they were possessed of an original right of making laws and imposing taxes in all the dependant dominions of the Crown, those which were properly *colonies*, or *plantations*, settled by emigrants from England under the authority of the Crown, as well as those which were conquered from foreign states; and that this right continued in them till they had voluntarily divested themselves of it by charters, or proclamations, or other sufficient

sufficient instruments under the great seal, communicating a portion of it to the inhabitants of such dependant dominions, to be exercised by assemblies of their representatives. This, I say, seems to have been the opinion of the kings of England : but it does not seem ever to have been recognized by their subjects either in those dependant dominions, or in England. For in king James the 1<sup>st</sup>'s time the parliament of England conceived themselves to have a right to co-operate with the king in making laws concerning Virginia, though that king, and his secretary of state, Sir John Cooke, and other ministers, denied that they had any right to intermeddle with it. And we have just now seen that in the province of New-York, (which is almost the only province of America which was governed for any length of time without an assembly, at least since the restoration) the inhabitants never thoroughly acquiesced under the government of the governours and councils appointed by the duke of York, though they submitted to it for a few years. This doctrine, therefore, of a sole right of making laws for the dependant

pendant dominions of the crown of England being originally vested in the crown and continuing in it till the crown shall have voluntarily parted with it by an act under the great seal of England, may be justly considered as, at least, a doubtful doctrine, if not a false one, since it has never been freely recognized by all the parties whom it concerns, which alone can make a doctrine concerning political authority quite clear and certain. But the claim made to this power of legislation by the Crown (whether well or ill founded) seems to have been extended as well to colonies, or plantations, settled by emigrants from England, as to countries obtained by conquest. For the province of New-York was considered in the former light by king Charles the 2d, and claimed and seized by colonel Nichols upon that ground before the declaration of war against the States of Holland, as we have already observed : and yet it was governed by a governour and council only, by virtue of the king's grant of the powers of government over it to the duke of York, for the space of eighteen years, as well as Jamaica, which was conquered from  
the

the Spaniards during the usurpation of Oliver Cromwell. And, if it should be alledged that Jamaica, though conquered from the Spaniards, was nevertheless considered by king Charles the 2d as a *colony*, or *planted* country, and not as a conquest, because of the almost total abandonment of it by its old Spanish inhabitants soon after the conquest of it, we shall then have two examples, instead of one, of the exercise of legislative authority over English colonies by the Crown alone, though in neither case, as I believe, with the perfect satisfaction of the inhabitants so governed.

## FRENCHMAN.

I am much obliged to you for this account of the claims of the Crown upon this subject, which I perceive to be one of those disputable questions upon which the friends of power and the advocates of liberty may have plausibly maintained contrary opinions. However, I should incline to think that the declaratory act of the year 1766 ought to be considered as having settled this matter against the pretension of the Crown, at least with respect

Conclusion drawn from the declaratory act in 1766 against the sole legislative authority of the Crown over the American colonies.



respect to its American dominions ; since it declares that in all those dominions, the province of Quebeck not excepted, in which no assembly of the freeholders had been then, or has been yet, established, the king and parliament conjointly had the power of making laws to bind the inhabitants in all cases whatsoever. This seems to imply that such a government as was established in Charles the 2d's reign in the province of New-York and the island of Jamaica by only a governour and council appointed by the Crown, could not now be legally established in the province of Quebeck, (though no assembly has yet been called there) without an act of parliament for the purpose.

### ENGLISHMAN.

The said conclusion is confirmed by the late Quebeck act.

I think there is much weight in your observation. And it is confirmed by what we have seen done with respect to this province by the late act of parliament, which has given you so much uneasiness. For we learn from it that his Majesty's ministers of state, having determined within themselves that no assembly of the people ought to be established

established in this province, but that it ought to be governed by a governour and council only, (as the province of New-York was during those eighteen years above-mentioned,) did not, in the year 1774, think proper to establish such a mode of government here by the king's single authority by granting the governour a new commission under the great seal of Great-Britain containing a delegation of the power of making laws for the province, to be exercised by the governour and council only, without an assembly of the people, but called in the assistance of parliament for that purpose. Surely this was an acknowledgement on the part of the Crown of a want of sufficient legal authority in itself alone to delegate these powers of legislation to a governour and council only, without the concurrence of an assembly of the people!

#### FRENCHMAN.

This argument seems to be just and strong. Yet there are two objections to it which I beg leave to state to you, which seem somewhat to diminish its force. If these can be removed, I shall look upon it as quite conclusive.

VOL. II.

D d

ENG-

## ENGLISHMAN.

Pray, what are those objections?

## FRENCHMAN.

An objection  
to the forego-  
ing conclu-  
sion, drawn  
from the king's  
proclamation  
of October,  
1763.

The first of them is as follows. You know that our gracious sovereign was pleased, soon after the cession of this province to the crown of Great-Britain by the last treaty of peace, to publish a proclamation under the great seal of Great-Britain, dated on the 7th of October, 1763, in which he promised the inhabitants of this province the *immediate* enjoyment of the benefit of the laws of England, and that they should be governed as to matters of legislation by a governour, council, and assembly of the freeholders and planters of the province, as soon as the situation and circumstances of the province would admit thereof. Now it may be said perhaps, that by this proclamation the king had divested himself of the power he before possessed, of making laws for this province by his single authority, or of delegating the power of doing so to a governour and council only,

only, without an assembly, because such a mode of government would be different from that which he had, by his proclamation, promised to establish here; and that therefore an act of parliament became necessary to revoke and abolish that proclamation. This, I conceive, may be said by the advocates for this legislative power in the Crown, in order to get rid of the inference you have drawn against it from the application made to the parliament for the purpose of delegating the legislative authority, in this province to the governor and council only. I don't know whether I make myself rightly understood. But, I imagine, an objection of this kind may be formed against your inference; and I should be glad to know what you would alledge in answer to it.

### ENGLISHMAN.

I understand your objection very well; but do not think it of much weight. For, though the proclamation you allude to gives the people of this province an immediate right to the benefit of the English laws, yet

An answer to  
the said objec-  
tion.

The proclamation did not promise the immediate establishment of an assembly, but only that one should be summoned as soon as the circumstances of the province would permit.

It therefore did not preclude the king from making laws for the province before an assembly was established in it, if he had a right to do so before the proclamation.

it does not give them an immediate right to be governed by an assembly, but only a right to be so governed *as soon as the situation and circumstances of the province will admit thereof*. Until that period of *fitness* arrives (which, in the opinion of the king and parliament of Great-Britain, is not yet come,) there is nothing in the proclamation that precludes the king from making laws for the province by his single authority, without the concurrence of the parliament, and consequently from delegating to a governor and council only, without an assembly, the said power of making laws for it, supposing that he was legally possessed of such a legislative power before the proclamation was published. If therefore the king was legally possessed of such a legislative power before he published his proclamation, he continued to be possessed of it after the proclamation until the said season of *fitness* for establishing an assembly in the province should be arrived, of which, I presume, his Majesty, when he published his said proclamation, meant that himself should be the judge. He might therefore, until the said season of fitness, have exercised the  
said

said legislative authority over this province either in his own person by making laws for it by his own edicts, or proclamations under the great seal of Great-Britain; or by his deputies in this province, to wit, the governor and council, without any breach of the aforesaid proclamation. But he did not think proper to exercise or delegate his said authority in that manner, but called in the assistance of his parliament to enable him to make such a delegation of legislative authority to the governor and council of this province. Therefore it may justly be concluded that he did not conceive himself to be legally possessed of such a legislative authority over this province either before or after his said proclamation.

Therefore the foregoing conclusion remains in the same degree of force as if there had been no proclamation.

It is true indeed that there is one branch of the late Quebec-act which his Majesty's single authority would not have been competent to establish in the province, either before or since the proclamation of October, 1763, even according to the doctrine laid down by Lord Mansfield of the legislative power of the Crown over conquered countries, except that which establishes the Roman Catholick

There is no provision in the Quebec-act which might not have been established by the single authority of the Crown according to the doctrine of its sole legislative power over conquered religion.

tries, and which other crown-lawyers have extended to *colonies*, or *planted* countries as well as *conquered* ones; I mean that branch of the said act which relates to the establishment of the Roman-Catholick religion in the said province, or which gives the priests a legal right to their ecclesiastical benefices and tythes, and laymen a right to hold places of trust and profit, without taking the oath of supremacy, and requires them to take a certain new oath of allegiance in its stead. For this branch of the said act is contrary to the statute of the 1st of queen Elizabeth, which expressly relates to the future dominions of the crown of England, as well as those which at that time belonged to it: and Lord Mansfield allowed that the king's legislative authority over conquered countries was restrained by all such antecedent acts of parliament as were expressly declared to extend to them. It would therefore have been necessary, when his Majesty's ministers conceived it to be proper to exempt the Canadians in the cases above-mentioned from taking the oath of supremacy, to procure an act of parliament for this purpose. But this necessity

That provision could not have been made without an act of parliament, because it is contrary to the statute of supremacy in the 1st of Q. Elizabeth.

necessity did not arise from the proclamation, and did not extend to any other subject contained in the Quebec act, besides this of the abolition of the oath of supremacy, there being no other provision in it that is contrary to any antecedent act of the English parliament that expressly relates to that province. If therefore the king had possessed a legal right of making laws for that province in all other respects, and upon all other subjects but that of the abolition of the oath of supremacy, it would have been sufficient to make an act of parliament for the regulation of that single subject; and there would have been no occasion to insert in it all the other clauses it contains, and more especially that which delegates to the governor and council of the province, without an assembly, the power of making laws to bind its inhabitants; but these things might have been left to be settled by his Majesty's single authority by his edict, or proclamation, or other sufficient instrument under the great seal. But it was thought proper on that occasion to insert these clauses in the said act of parliament, and, amongst them, the

clause

But the other provisions of the Quebec act might, according to the aforesaid doctrine, have been made by the single authority of the Crown.

Nevertheless it was thought proper to insert them in the said act of parliament.



Therefore the king's ministers must have thought that the said doctrine was not true.

clause for vesting a legislative authority in the governour and council only. We may therefore conclude that it was the opinion of his Majesty's ministers of state and advisers in the business of the said Quebec-act, that his Majesty was not possessed of a legal right to regulate all those matters by his single authority, and, more especially, to delegate to his governour and council only, without an assembly, a power to make laws to bind the province. And I have above endeavoured to prove that this want of such a legislative authority could not arise from the promise contained in the proclamation of October, 1763, of establishing an assembly in the province; because this promise was not to be immediately accomplished, *but only as soon as the situation and circumstances of the province would admit thereof*; until which season of ripeness for such a measure, we must presume that the new laws and regulations, that might become necessary for the good government of the province, were intended to be made by that person, or persons, who had a legal authority to make them before the said proclamation issued.

issued. It follows therefore that this want of legislative authority must have been deemed by the advisers of the Québec-act to have been originally inherent in the Crown before the proclamation of October, 1763. This, I hope, is a sufficient answer to the objection you have stated to my above-mentioned inference, on the ground of the royal proclamation of October, 1763.

## FRENCHMAN.

I am pretty well satisfied with this answer, so far as I depend upon my own judgement only. For it certainly does seem reasonable to suppose that during the interval that should elapse between the issuing of the proclamation of October, 1763, and the time at which his Majesty should be of opinion that the situation and circumstances of the province did admit of the establishment of an assembly, it might become necessary to make some new laws and regulations in the province; and consequently we must presume that his Majesty foresaw this necessity, and meant that such laws should be made. The only remaining question seems to be, *by whom* he

VOL. II.

E c

intended

intended such laws should be made? and the natural answer to this question, (so far as it can be collected from the bare perusal of the proclamation itself,) seems to be, that he intended that they should be made by that person, or persons, (whoever they may be,) that had the legal right to make them before the said proclamation was published : because the proclamation makes no alteration in the matter during the aforesaid interval. And this lays a foundation for your inference, that, since the king's ministers thought proper to make use of the authority of parliament for the purpose of vesting the powers of legislation in this province in the governor and council only, notwithstanding the situation and circumstances of the province did not yet admit of the establishment of an assembly in it, they were conscious that the king alone was not possessed of a legal right to do so. But what staggers me a little on this occasion is, that it seems to me, from what you related to me of the judgement of the court of King's Bench in England in that case of *Campbell* and *Hall* relating to the duty of four and a half per cent. that had been

The judges of the Court of King's Bench in England were of opinion, in the case of *Campbell* and *Hall*, that the royal

proclamation of October, 1763, operated as an immediate bar to the exercise of the powers of legislation in the four new governments by the single authority of the Crown.

been illegally collected in the island of *Grenada*; I say, it seems to me from your account of that case, that Lord Mansfield and all the other judges of the court of King's Bench were of a different opinion from us with respect to the time at which the proclamation of October, 1763, began to operate as a bar to the exercise of the king's sole legislative authority, supposing him antecedently to have been possessed of such authority. For, if I remember rightly the dates of the publick instruments relating to the island of Grenada, the letters patent imposing the duty of four and a half per cent. were published in July, 1764; and the commission of governour Melvil, to be captain general and governour in chief of that island, (whereby, amongst other things, he was empowered to summon an assembly of the freeholders and planters of it,) had passed the great seal in the preceding month of April, of the same year, 1764; but the first assembly of the province did not meet till about December, 1765, that is, till near a year and a half after the issuing of the letters patent that imposed the said duty of

four and a half per cent. and more than two years after the publication of the proclamation of October, 1763, which promised the people of Grenada, (as well as those of the province of Quebeck and the two Floridas,) a government by an assembly, (not immediately, but) *as soon as the situation and circumstances of the said new governments would admit thereof*. Here, therefore, was an interval of more than two years after the publication of the proclamation in October, 1763, before the assembly of Grenada met, during which, according to your way of reasoning, the king was not precluded by his proclamation of October, 1763, from exercising his legislative authority in the island of Grenada, in the same manner as before the said proclamation was made, supposing he had, before that act, been legally possessed of such authority: and in the former half of this interval, namely, in July, 1764, his Majesty did exercise this legislative authority by issuing those letters patent which imposed the said duty of four and a half per cent. These letters patent therefore, according to your doctrine, must have

have been legal, when they were issued, if they would have been so before the said proclamation of October, 1763. But the judges of the court of King's Bench in England have declared just the contrary, to wit; that those letters patent were illegal at that time, because they were posterior to the said proclamation, though they would have been, or, perhaps, might have been, legal, if they had been issued before it. Have you any way of reconciling this opinion of those learned judges concerning the *immediate* operation of the king's proclamation of October, 1763, as a bar to the exercise of his antecedent legislative authority, with your own method of reasoning upon it in the case of this province of Quebec? or am I reduced to the necessity of adopting one of these opinions in direct opposition to the other?

#### ENGLISHMAN.

Truly your difficulty seems to be very well founded: nor do I know how to reconcile these contrary opinions concerning the time at which the proclamation of October, 1763, ought to be considered as a bar to the exercise  
of

of the king's legislative authority. I cannot therefore expect that you should adopt my manner of interpreting that proclamation in opposition to that of those learned judges. But, as to myself, I must still retain my own opinion, notwithstanding it is different from theirs; because the judgements we form upon subjects that lie within the reach of our understandings, and which we have fully considered, do not depend upon our choice, but are the necessary effects of the impressions which the reasons that have been offered to our consideration concerning them, have made upon our minds; and I do not recollect that any reason was given by those learned judges to shew why the king must be understood to be precluded by that proclamation from the exercise of his antecedent legislative authority over the island of Grenada during the interval that should elapse between the time of issuing it and the time at which his Majesty, in his royal wisdom, should think the situation and circumstances of the island to be such as to admit of the measure of summoning an assembly of the people; I say, I do not recollect that any reason was given  
to.

to shew this, except the single circumstance of the want of an express clause in the said proclamation of October, 1763, to reserve the legislative authority over the said new governments to the Crown in the said interval before the intended assemblies of the people could be established, which I must confess I did not think a sufficient reason to warrant that conclusion. However, I will confess that this difference of the opinion of those learned judges from my own upon this subject, (which, in truth, I was not aware of till you mentioned it,) makes me diffident of the justness of my own way of considering it, though it has not intirely made me a convert to their opinion: and I therefore lay much less stress than I did at first, on the inference I drew from the application made to the parliament by the king's ministers, when they recommended the passing the Quebec-act, for the purpose of vesting a legislative authority over the province of Quebec in the governour and council only.—But, I think, you said you had another objection to that inference, which you wished me to consider. Pray, what was it?

This opinion of the judges of the King's Bench renders the foregoing answer to the said first objection very doubtful.

FRENCH-



## FRENCHMAN.

A second objection to the  
aforesaid inference.

That other objection to your inference was grounded on the government that had *in fact* been established in the province ever since the last peace to the 1st of last May, 1775, when the present Quebec-act took place. For during all that time this province was governed by a governour and council only, without an assembly of the people, by virtue of the king's single authority, and without an act of parliament to authorize that mode of government: and the governour and council exercised a legislative authority in the province in various instances, as you well know, many ordinances having been made by them during that interval. Now the conduct of the Crown in thus establishing in this province a government by a governour and council only, without an assembly, for the space of between 10 and 11 years, (namely, from August, 1764, when general Murray's commission of captain-general and governour in chief of this province was first published in the province, to the 1st of last May, when the Quebec-act became of force

in

in it,) seems to preclude the inference, which you have drawn from the clause in the said Quebec-act which establishes this kind of government, of a consciousness in his Majesty's ministers of state of a want of a legal right in the Crown alone to establish this mode of government. For, if they were conscious of such a want of legal authority in the Crown, why did they advise his Majesty to exert such an authority before the passing of the Quebec-act by delegating to the governor and council only, without an assembly of the people, the power of making laws to bind the province? or was no such power delegated to them by the Crown, though they took upon them to act as if it had been so? in which case the several ordinances made by them before the operation of the Quebec-act must have had no legal validity.

### ENGLISHMAN.

This is a very fair and natural objection to the inference I had drawn from the Quebec-act, and well deserves to be considered. But I believe I shall be able to answer it in a manner that will perfectly satisfy you, by

VOL. II. F f explaining

explaining to you the true state of the fact upon this subject during the ten or eleven years you speak of, which I perceive you are not fully acquainted with. The fact is as follows.

An answer to  
the said second  
objection.

In the commission of captain-general and governour in chief of this province granted by his Majesty, under the great seal of Great-Britain, to General Murray in the year 1764, there is a clause empowering the General to summon an assembly of the freeholders and planters of the province as soon as the situation and circumstances of the province will admit thereof, and, with the consent of such assembly and of the council of the province, to make laws, statutes, and ordinances for the peace, welfare, and good government of the same. But, though it is certain that his Majesty was not then, and, as it since appears, is not yet, of opinion that the situation and circumstances of this province were such as to admit of the measure of summoning such an assembly, yet it was not thought proper to insert a clause in the said commission to empower the governour, *in the mean*

*mean while and until such assembly should be summoned*, to make such laws and ordinances by the advice and consent of the council of the province only. And yet it must be allowed that *that* would have been the legal and proper way of delegating such a legislative authority to the governour and council only, if the Crown was legally possessed of a right to make such a delegation, such high powers being incapable of being legally transferred from the sovereign to any of his subjects in any other manner than by an instrument under the great seal. This omission, therefore, of a clause for this purpose in the governour's grand commission under the great seal, (which was the only legal foundation of the government of this province,) though his Majesty's ministers had at the same time no intention of speedily calling an assembly, and consequently such a clause would have been singularly expedient, if it had been lawful, did not look like a claim on the part of the Crown to a legal right of delegating such legislative powers to the governour and council only, but rather like a tacit acknowledgement of the want of such a right.

Of the legislative authority exercised in the province of Quebec before the late Quebec-act.

What then, you will ask, could be the design and intention of his Majesty's ministers on this occasion? Did they imagine that the province might be governed for some considerable time, (namely, until it should be expedient to summon an assembly,) without passing any laws or ordinances at all?—Or, if they did not think this practicable, but intended that some ordinances should, from time to time, be passed in it, as occasions might require, by whom did they intend that such ordinances should be made?—The proper answers to these questions I take to be as follows. His Majesty's ministers did not suppose that it would be possible to govern the province without passing any new ordinances *at all* in it, as occasions might require, before an assembly should be summoned in it; but they imagined that it might be sufficient for its temporary welfare during that interval, to pass only a few ordinances upon subjects of small importance, such as what you Frenchmen call *reglements de police*, or regulations relating to publick conveniency and decorum, without meddling with the criminal law in its higher branches,

fo

so as to affect the lives or limbs of his Majesty's subjects in the province, or their right to personal liberty, and without making free with their property by the imposition of any duties or taxes. And with this view his Majesty thought fit to delegate to general Murray, the governour of the province, by a private instruction under his signet and sign-manual, the following very limited legislative authority, to be exercised by the advice and with the consent of the council of the province only, and without the concurrence of an assembly, to-wit, *an authority to make such rules and regulations as should appear to be necessary for the peace, order, and good government of the said province; taking care that nothing be passed or done that shall any ways tend to affect the life, limb, or liberty of the subject, or to the imposing any duties or taxes.* This legislative authority, you plainly see, was very short of that which had been communicated to the governour by his commission under the great seal, to be exercised in conjunction with an assembly of the freeholders; which was *to make laws, statutes, and ordinances for the publick peace, welfare,*

A certain very limited legislative authority was delegated to the governour and council, without an assembly, by an instruction under the king's signet and sign-manual.

*welfare, and good government of the said province,* and this without any such restrictions as those above-mentioned with respect to the imposition of duties or taxes, or to the passing such laws as might affect the lives, or limbs, or liberty of his Majesty's subjects. Yet, limited as this authority was, it was all the legislative authority that had either been delegated, or supposed to be delegated, to the governour and council of this province before the late Quebec-act. And, if you reflect on the small extent of this authority, and the private, imperfect, manner in which it was delegated, you will hardly, I imagine, be disposed to consider it as a fair and open exertion of an authority in the Crown to make laws for this province, or to delegate the power of doing so to the governour and council only.

## FRENCHMAN.

Conclusion drawn from the conduct of the Crown in delegating the said legislative authority by an instruction.

I certainly cannot consider it in that light, but must rather look upon it as a kind of acknowledgement of a want of such a legal authority in the Crown, and an expedient to make a shift without it for a short time, by a tender and cautious use of a very limited legislative

legislative power of a doubtful nature, and which could be justified only by a kind of seeming temporary necessity of having recourse to it during the interval of time that might elapse before his Majesty should judge the situation and circumstances of the province to be such as to admit of the summoning an assembly. I therefore am satisfied that it ought not to operate in any degree as a bar to the inference you are disposed to draw from the use made by his Majesty's ministers of state of the authority of the British parliament, on the occasion of the late Quebec-act, for the purpose of vesting in the governour and council of the province a more ample power of making laws and ordinances for its government, to wit, that the Crown was conscious of the want of a legal right to delegate such a legislative power to them without the concurrence of the parliament. But that inference will, in my opinion, remain just and unimpeached, supposing the proclamation of October, 1763, did not operate as an immediate bar to the exercise of any legislative authority in the province without the concurrence of an assembly,



assembly, but left the Crown at liberty to act according to the powers it had legally possessed before, during the interval that should elapse before the situation and circumstances of the province should, in his Majesty's opinion, admit of the establishment of an assembly. But this, we must remember, the judges of the King's Bench in England have unanimously determined against us.

Of the nature  
of instructions  
to governours  
of provinces  
under the  
king's signet  
and sign-manual.

But, before we take leave of the subject we have been just now considering, I mean, the political situation of this province before the late Quebeck-act, I must trouble you with a question that occurs to me concerning the king's instructions to his governours of his American provinces. Pray, is it understood that any powers whatsoever, even such as are legally vested in the Crown and are capable of being legally delegated by it, can be legally delegated by an instruction? For it seems strange to me that they should be so, seeing that instructions are things of a private nature, that seem intended to regulate the conduct of governours in the use of the high powers that are vested in them by their publick

publick commissions, rather than to be the instruments by which such powers are conveyed to them.

## ENGLISHMAN.

Your conception of this matter seems to me to be perfectly just. Instructions to governours can convey no powers to them whatsoever, but are only to be considered as directions to them how to use the powers which are conveyed to them by their commissions, and are intimations of his Majesty's resolution to remove them from their governments and appoint other persons in their room, in case they shall use those powers in a different manner from that which is pointed out by their instructions. In short, they are instruments of a private nature; and, accordingly, we are informed by Mr. Smith in his excellent history of New-York, that in that province the governour's instructions, (though they are in number above an hundred, and regulate the governour's conduct on almost every common contingency,) are never recorded. And the same thing may be said, as I believe, with respect to the instructions given

VOL. II.

G g

to

No written instrument can legally convey any powers of government, unless it be made publick.

to the governours of other provinces. Now no instrument can, (as I conceive,) convey powers of government in any country, or according to any system of laws, except it be of a publick nature, and the contents of it be made known to the persons over whom those powers are to be exercised, and who are to be bound to pay obedience to the acts that are to be done in pursuance of them. For how else shall the subjects over whom the person intrusted with such powers is to preside, know that he is to be their governour, or in what respects, and to what degree, they are bound to obey his orders? If a man of rank comes into a province, and tells the people of it, by word of mouth only, that the king has appointed him their governour, that surely will not be sufficient to intitle him to their obedience; but they not only *may*, but *ought* to refuse to obey him till he produces some regular instrument in writing, properly authenticated, or proved to proceed from the king's authority, by which it appears that he is so appointed. And the proper instrument for this purpose in the English government is a commission under the great seal of Great-Britain,

The proper instruments for this purpose in the English government are commissions under the great seal.

Britain, the authority and importance of which seal is so highly protected by the law of England that it is the crime of high treason, and punishable with loss of life and forfeiture of lands and goods to the Crown, to counterfeit it. It is only therefore by the production of a commission so authenticated that a governour of a province can intitle himself to the obedience of its inhabitants.

And further, when such a commission is produced and published in a province, so as to give the people of it a satisfactory assurance that the person who produces it has been appointed by the king to be their governour, they are only bound to obey him in the exercise of such powers as are conveyed to him by the commission, and not in other matters that are not mentioned in it, or that do not fall under the powers that are specified in it. I mention this, because I have known some persons imagine a governour of a province to be *the full and general* representative of the king's majesty, and to be legally capable of exercising all the acts of authority in the province which

Governours of provinces have a legal right to exercise only those powers of government which are specified in their commissions :

And are not  
the full and  
general repre-  
sentatives of  
the king.

the king himself might lawfully exercise, if he were present there in his own person. But this is, undoubtedly, a very mistaken notion, because the king never delegates to any of his governours of provinces the whole of his royal authority, but specifies in their commissions the powers he intends they should exercise. It is true indeed that he might, if he pleased, make such a delegation of his whole royal authority, by expressly declaring in his commissions to his governours, "that he gave them full power to act in their respective provinces in his place and stead, as his vice-roys and lieutenants, and to exercise every power of government in the same which he himself might lawfully exercise if he were there personally present:" at least I know of nothing that could hinder him from so delegating his whole authority, if he thought fit. But it is certain that he never does so delegate it in his commissions to his governours of provinces, but, on the contrary, specifies, at considerable length, in those commissions, the particular powers he intends they should exercise in their respective provinces,

provinces, and, with respect to some of those powers, expressly restrains his governours from exercising them in the same extent as he himself might do ; as, for instance, in the power of granting pardons to criminals, they being usually restrained by the words of their commissions from granting pardons to persons guilty of treason or wilful murder. Since therefore the king usually thinks fit to delegate to his governours of provinces some portions of his royal authority, and not others, there is no way of knowing what portions of it he has so delegated, and what he has not, but by examining the commissions he has granted : and those powers that are specified in the commissions must be allowed to belong to the governours to whom the commissions are granted ; and the acts done by the governours in the execution of those powers must be submitted to as legal : and all other branches of the royal authority besides those which are so specified, must be supposed to have been reserved by his Majesty to his own person, and not to have been delegated to his governours.

And

If the king were to make his governours of provinces his full and general representatives, it would be attended with great inconveniences.

And indeed it is a most prudent and judicious practice thus to express in the commissions of the governours of provinces the particular powers which his Majesty intends to delegate to them, instead of delegating to them the whole royal authority by such general and comprehensive words as are above mentioned, or making them the *general representatives* of their sovereign, (as I have known some people consider them,) with all the power which the king himself would lawfully possess, if he were present there in his own person: because, if this were done, it would give occasion to numberless disputes and difficulties concerning the limits of the powers which the king himself might lawfully exercise in the provinces, if he were so personally present in them, which, it is probable, the governours of provinces would often conceive to be more various and extensive than the people under their government would be willing to allow; all which disputes are happily avoided by the prudent practice of specifying in the commissions themselves the powers which are intended to be delegated to the governours to whom the commissions are granted.

It

It seems reasonable therefore to conclude upon the whole, that a governour of a province has a right to exercise just so much of his sovereign's royal authority as is specifically delegated to him by the words of his commission under the great seal, and no more; and that every other delegation of the royal authority to him by any instrument not under the great seal, is illegal and void, even though the power so delegated should be such as the Crown has indisputably a legal right to; and much more, therefore, in all other cases.

## FRENCHMAN.

This way of reasoning on the nature of a governour's authority appears to me to be very clear and just. But I have been told that it has not been always adopted by the king's governours in America. For, according to this doctrine, the king's instructions to his governours, being under his signet and sign-manual, can convey no powers to them whatsoever, nor even create any legal restraint upon them in the use of the powers which are legally delegated to them in their commissions

The king's instructions under the signet and sign-manual cannot legally operate so as either to enlarge or restrain the powers of government contained in the governour's commission.



commissions under the great seal, so as to make those acts become illegal and void, which are done agreeably to such powers given in the commissions but in opposition to the said instructions. Thus, if the king, in his commission under the great seal, gives his governour a general power to grant any lands in the province upon the usual conditions; and, in his private instructions under his signet and sign-manual, directs him to forbear making grants of such and such particular tracts of land, which his Majesty chuses to reserve to himself; and the governour, notwithstanding such instruction, makes a grant of land in the said excepted tracts; such a grant will be valid by virtue of the general power of granting lands contained in the commission under the great seal, notwithstanding the exception of those particular tracts of lands contained in the private instruction. And, in like manner, an act done in pursuance of a power contained in an instruction, but not in the commission under the great seal, must be considered as illegal and void. This, if I understand you right, is your opinion upon this subject.

E N G.

## ENGLISHMAN.

It is exactly so.

## FRENCHMAN.

But I have been told that an opinion has prevailed amongst some governours of provinces and other servants of the Crown, that the instructions given to governours under the king's signet and sign-manual are of equal authority with the commissions under the great seal; and that there is a clause in almost every governour's commission which refers to the instructions, and, as it were, adopts them into the commission, and makes them partake of its high legal authority derived from the great seal. Pray, do you know of any such clause in the commissions usually given to governours of provinces? and do you conceive that such a clause can have the effect ascribed to it? For to me it appears a very indirect and whimsical way of proceeding.

Of a clause in the commissions of governours of provinces, which refers to their instructions.

Vol. II,

H h

ENG.

## ENGLISHMAN.

The words of  
the said clause.

There is in some of the commissions to governours of provinces, and perhaps in all of them, such a clause as you speak of. In the commission to Sir Danvers Osborne to be governour of New-York in the year 1754 it is expressed in these words. " Know you  
" that We, reposing especial trust and confidence in the prudence, courage, and  
" loyalty of you, the said Sir Danvers Osborne, of our especial grace, certain  
" knowledge, and meer motion, have  
" thought fit to constitute and appoint you,  
" the said Sir Danvers Osborne, to be our  
" captain-general and governour in chief in  
" and over our province of New-York and  
" the territories depending thereon in America: and we do hereby require and  
" command you to do and execute all  
" things in due manner that shall belong  
" unto your said command and the trust  
" we have reposed in you, according to the  
" several powers and directions granted or  
" appointed you by this present commission  
" and

" and instructions herewith given you, or  
 " *by such further powers, instructions, and*  
 " *authorities, as shall at any time hereafter*  
 " *be granted or appointed you under our signet*  
 " *and sign-manual, or by our order in our*  
 " privy council, and according to such rea-  
 " sonable laws and statutes as now are in  
 " force, or hereafter shall be made and  
 " agreed upon by you, with the advice and  
 " consent of our council and the assembly  
 " of our said province under your govern-  
 " ment, in such manner and form as is  
 " herein after expressed." And there is a  
 clause of the same import, and expressed  
 in almost the same words, in the commis-  
 sion given to general Murray to be governour  
 of this province of Quebeck in November,  
 1763, and likewise in the two commissions  
 given to general Carleton, in the years 1768  
 and 1774 to be governour of the same pro-  
 vince. In this clause the words, "*by such*  
*further powers, instructions, and authorities,*  
*as shall at any time hereafter be granted or*  
*appointed you under our signet and sign-manual,"*  
 are those to which you allude, and which  
 have been sometimes alledged as a proof that

The words of  
 reference to  
 the instruc-  
 tions.

An inference  
that has been  
sometimes  
drawn from  
thesaid clause.

Tendency of  
the said inference  
to undermine the  
authority of  
the great seal.

the instructions given to a governour under the king's signet and sign-manual are of equal weight and authority with the powers contained in his commission under the great seal, (or, as the persons who argue in this manner seem to conceive,) partake of the authority of the commission under the great seal by being thus referred to by it. But this is in my opinion a very absurd and pernicious way of reasoning, and has a tendency to undermine and destroy the authority of the king's great seal, which is the peculiar instrument by which the law of England has appointed that, in all great and solemn acts, the regal power shall be exercised. For, if *some* additional powers, beyond those which are expressed in the commission, may thus be delegated to a governour of a province by a private instruction under the king's signet and sign-manual, by virtue of a previous reference to them inserted in the commission, why may they not *all* be so delegated, and the commission be reduced to this one sentence, " We do appoint you our captain-general and governour in chief of such a province, [with such powers as we shall

shall hereafter invest you with by our instructions under our signet and sign-manual?"

But, if this were done, it is evident that the commission under the great seal would no longer be a real and effectual commission, delegating powers of government to the governour to whom it was given, but would be a mere nominal commission, which could only operate as a grant of the title of governour of such a province, as a title of honour; and the instructions would in truth be the commission, or important instrument by which the powers of government would be communicated to the governour; that is, an instrument under the king's signet and sign-manual would be the means of conveying those high powers to the governour which, it is universally allowed, can be legally delegated only under the great seal. It is certain therefore that *all* the powers usually vested in a governour of a province cannot legally be delegated to him in this manner by an instrument under the king's signet and sign-manual: and consequently, since the same reason holds against the delegation of any one power of government in this manner as against that

Conclusion a-  
gainst the said  
inference.

that of any other power, we may conclude that no one power of government can be legally so communicated, but that all the attempts to delegate any powers of government by the king's instructions under his signet and sign-manual, and likewise all attempts to restrain by such instructions the full exercise of the powers legally delegated to a governour in his commission under the great seal, are illegal and void. This, at least, is my opinion beyond all manner of doubt; and therefore I look upon those words to which you alluded in the commissions of many governours of provinces, to wit, "*by such further powers, instructions, and authorities, as shall at any time hereafter be granted or appointed you under our signet and sign manual,*" as idle and unoperative in a legal way, but yet at the same time as tending to undermine and elude the authority of the great seal, and introduce a practice of exercising and delegating the great powers of the Crown by instruments under the king's signet and sign-manual, instead of instruments under that more solemn, important, and antient seal which the law has always recognized as the

the true testimony of the full and deliberate exertion of the royal authority, and has accordingly protected by the sanction of the highest penalties. And therefore I most heartily wish that these words, or, at least, the two words *powers* and *authorities*, and the word *granted*, which refers to them, were to be left out of all the commissions which shall hereafter be granted to his Majesty's American governours.

It would be right to leave out the said words of reference to instructions in all future commissions to governours of provinces.

## FRENCHMAN.

I intirely agree with you in thinking that they ought to be left out of the commissions, and cannot but wonder that they have ever been inserted in them. For I cannot conceive what objection the kings of Great-Britain, or their ministers, can ever have had to the specifying in the most ample manner in the commissions given to the governours of provinces under the great seal, all the powers they intended the said governours should exercise. This would have at once removed all doubts and difficulties that might arise concerning the legality of the delegation of those powers, and would have been

It seems strange that they were ever inserted in the commissions.

as



as short and easy a method of conveying them as the other by the signet and sign-manual, and, in my apprehension, more suitable to the dignity of the royal character; because, the higher is the degree of authenticity with which the king's acts of state are transacted, and the more solemn and formal the manner of transacting them, the greater will be the reverence with which they will be received by the people, and the more willing and ready the obedience that will be paid to them. It seems therefore surprizing to me that it should ever have entered into the heads of the king's ministers of state to advise his Majesty to attempt to delegate any powers of government to his subjects in any other way than under the great seal; and I beg you would let me know what you think may have been the motive that has given occasion to such a proceeding.

## ENGLISHMAN.

A conjecture concerning the reasons that may have been the occasion of inserting them in the commissions.

Truly I have been as much surprized at this practice as you can be: nor do I know any certain way of accounting for it. But I conjecture that the reason of it may have been

been as follows. The great seal of Great-Britain is kept by a great officer of state called *the Lord Chancellor, or Lord keeper of the great seal*, (for they are precisely the same officer under different titles,) who is generally some very eminent and learned lawyer, bred to the profession of the law from his youth, and much skilled in the practice of it, and deeply versed also in the civil history of England and the constitution of its government, or that part of the law of the kingdom which relates to the distribution of the several powers, by which it ought to be governed, and the forms and solemnities with which those powers ought to be administered. And it is understood to be his duty to examine the contents of every instrument to which he is commanded by the king to put the great seal, and to satisfy himself that it contains nothing but what is agreeable to law and justice before he puts the seal to it. And, if he puts the seal to any instrument that is contrary to law, or which, though agreeable to law, is manifestly contrary to the welfare of the kingdom, he is liable to be punished for so doing by the judgement

Of the usual character and qualifications of the lords chancellors, or lords keepers of the great seal, of Great-Britain.

of the House of Lords in consequence of an impeachment, or accusation, preferred against him before them by the House of Commons, and also, I believe, in the first case, or where he puts the seal to an instrument that is contrary to law, to an action at law at the suit of the person who is injured by means of such illegal instrument. These dangers, attending the abuse of the great seal, make it difficult for the Crown to do illegal acts under that sanction: because the lord chancellor, from his knowledge of law and history, his habits of examining matters of state with care and caution, and surveying all their relations and consequences, will not easily be brought to use the great seal for such purposes. But the case is otherwise with respect to the king's signet. The instruments executed under the king's signet are counter-signed by the king's secretaries of state, without ever under-going the lord chancellor's examination, or that of the privy-council, or even of the attorney-general, or any other person who, from his education and station in life, may be supposed to be acquainted with the law. For, as to the secretaries

Of the different temper and spirit that prevails amongst the king's secretaries of state.

Secretaries of state, you certainly must know as well as I do, that they are usually men of high rank, born to titles and great estates, and bred in habits of ease and luxury, and but little acquainted; or inclined to become acquainted, with so dry a subject as the law. Persons of this description, when they are placed in stations of authority, are much more likely to advise their sovereign to do acts of an irregular, or doubtful nature, without inquiring how far the law allows of them, than a learned and grave lord chancellor, if it were but through mere ignorance, and though their intentions were very pure: but it often happens that to this ignorance of the law they add a contempt for it and a disposition to disregard its restraints, and overleap the limits it prescribes to their authority, which they are apt to consider as narrow pedantick rules which it is below their dignity to submit to, and, like Achilles in the character given of him by Horace, *Jura negant sibi nata, nihil non arrogant armis*. They are therefore fond of the doctrines of *reason of state*, and *state necessity*, and the *impossibility of providing for great emergencies*

and extraordinary cases, without a discretionary power in the Crown to proceed sometimes by uncommon methods not agreeable to the known forms of law; and the like dangerous and detestable positions, which have even been the pretence and foundation for arbitrary power. I do not mean that all secretaries of state are of this way of thinking; for undoubtedly some of those ministers have been men of a different character; but there have been, as I believe, enough of that disposition to warrant me in saying that it is the general spirit and complexion of the office. Nor would it be difficult to find proofs of this *extra-legal*; or rather *supra-legal*, disposition in the powers they have assumed to themselves without any clear warrant of law for so doing, and in the manner they have exercised those powers thus unwarrantably assumed: of which I will mention to you one remarkable instance, which, in the case of the celebrated Mr. Wilkes, some years ago engaged the attention of all England. That gentleman had written, (or I should rather say, was supposed to have written; for it was never proved

An account of the arresting and imprisoning Mr. Wilkes in April, 1763, by a general warrant issued by the Earl of Halifax, one of the king's secretaries of state.

passed upon him;) a political paper called the North-Briton, N<sup>o</sup>. 45, in the month of April, 1763, soon after the conclusion of the late definitive treaty of peace, by which this province of Canada was ceded to the crown of Great-Britain: in which paper there was a passage that gave offence to the Court and was considered as in a high degree seditious. Upon this a resolution was taken by the king's ministers of state to arrest Mr. Wilkes and prosecute him in the court of King's-Bench for writing and publishing the said seditious paper, or libel; and he was accordingly arrested, and all his papers of every kind were seized, by virtue of a warrant issued to one of the king's messengers by the late earl of Halifax, who was at that time one of his Majesty's secretaries of state. And this warrant was a *general warrant*, which did not mention Mr. Wilkes's name, but empowered the messenger to arrest the persons (whoever they might be) who had been concerned in writing and publishing the said seditious paper, called the North-Briton, Number 45. This omission of Mr. Wilkes's name made the warrant utterly illegal,

The said warrant was illegal.

illegal, because it required the king's messenger (who was a mere ministerial officer, or rather who acted as such) to do that which was the business of a judicial officer, or magistrate, that is, to exercise an act of judgement of an high nature by determining who were, and who were not, concerned in the commission of the offence in question. This was an act of judgement of so important a kind that even a magistrate ought not, according to the maxims of the English law, to have ventured to do it without having received an information upon oath from some credible witness, that such, or such, a person had committed the offence in question, to be a ground for his ordering him to be arrested; because, if magistrates had a power of arresting men without such previous information, and merely upon their own suspicions, or pretended suspicions, they might cause any person, how innocent soever, to be thrown into prison whenever they thought fit. And much less can a magistrate delegate such a power of determining who is the person that has committed a particular offence, to a mere ministerial officer of justice, such as the

the king's messenger ; which is done whenever a general warrant is issued. This general warrant therefore issued by Lord Halifax was clearly illegal, and consequently the arrest and imprisonment of Mr. Wilkes in pursuance of it were illegal likewise, and became a just ground for an action at law at the suit of Mr. Wilkes against Lord Halifax, the secretary of state, for a false, or wrongful, imprisonment of him : and Mr. Wilkes did afterwards accordingly bring such an action against him in the court of Common-Pleas in England, and did recover, by the verdict of a jury, a large sum of money as a compensation for the damage he had wrongfully sustained by such imprisonment. It must nevertheless be acknowledged, in justice to the late Lord Halifax, that, though he issued the said general warrant, he was not incited to do so by the haughty spirit which I have been just now describing as too apt to influence the great men who fill those offices, but was himself rather inclined, (from his own natural good sense, and, as we may suppose, the moderation of his temper,) to insert Mr. Wilkes's name in the warrant, but

was

Mr. Wilkes afterwards brought an action of false imprisonment against Lord Halifax on account of this arrest, and recovered a large sum of money as a compensation for it.



was over-persuaded to the contrary by Mr. Philip Carteret Webb, who was at that time solicitor to the Treasury and who urged him to make the warrant *general*, because, he said, it had been the constant usage of former secretaries of state to frame their warrants in that manner, as indeed he afterwards proved to the world that it had been, by publishing a collection of warrants issued by different secretaries of state on various occasions in almost every reign for the preceding hundred years, or from the year 1662, if my memory does not deceive me, of which the greater part were drawn up in that vague and general manner. This may, perhaps, be sufficient to exculpate the late Lord Halifax; but it serves strongly to prove the violent spirit which has usually prevailed in the persons who have held the office of secretary of state, since it shews that for a hundred years together they have taken upon them to act, in the business of arresting state-offenders, in a manner that bids open defiance to the first principles of law and justice. And this they have done too without ever having

These general warrants, (though manifestly illegal,) had been usually issued by secretaries of state for an hundred years before.

The said practice shews the spirit of violence and arbitrary power that has usually prevailed in the secretary of state's office.

having been clearly invested by any statute of the kingdom with any power of arresting men at all, even by warrants that name, or describe exactly, the persons who are to be arrested by them, and that are grounded upon previous informations of credible witnesses upon oath; and certainly without having any such authority by virtue of the old common law, or general usage of England from time immemorial, because the office of secretary of state itself has not existed long enough for that purpose, being no older than the reign of Henry the 8th, which began in the year 1509, whereas, in order to be possessed of such an authority by antient custom from time immemorial, it ought to have been possessed of it before the time of king Richard the 1st, or about the year 1189. But the truth is, that the king's secretaries of state are his clerks, or letter-writers, whose business it is to make known his Majesty's pleasure to his ambassadors in foreign courts, or to the ambassadors of foreign courts at his Majesty's court, or to his Majesty's subjects in his own dominions on various occasions, but are not, or, at least, were not originally,

The secretaries of state have never been clearly invested with a power of arresting men at all, even by regular warrants.

his Majesty's magistrates, or the delegates of his judicial power for the purpose of administering justice in his name and behalf in any respect, and therefore ought not to arrest state-offenders any more than any other offenders, or any more than they ought to try them for their offences and condemn them to punishment, as is done by real magistrates. For the arresting, trying, and condemning men for offences against the laws are, all of them, branches of the judicial power of the Crown, and ought therefore to be exercised only by the known magistrates of the kingdom, to wit, the judges and justices of oyer and terminer, and justices of the peace, who are regularly invested with competent authority for that purpose by commissions under the great seal. And, as to the king's messengers, they are not the proper ministerial officers of justice, like sheriffs and constables, but are only (as their name imports) servants kept in the king's pay for the purpose of carrying messages for him with fidelity and expedition, either within the kingdom or without, as, for instance, to carry dispatches to his Majesty's ambassadors in foreign countries :

Nor are the king's messengers proper officers to execute such warrants.

tries : so that it seems doubtful whether even a legal warrant to arrest a man, issued by a known magistrate, as a justice of the peace or a judge of the court of King's Bench, can be legally executed by one of these messengers, unless it be in those cases, (if there are such,) in which it may be executed by any person whatsoever as well as by a sheriff or constable, or other known ministerial officer of justice. You see therefore that there is a threefold irregularity grown up in the secretary of state's office with respect to this practice of arresting men for state-offences. In the first place they have erected themselves into judicial officers, or magistrates, for this purpose ; in the second place they have made use of king's messengers, instead of sheriffs, or constables, or other known ministerial officers of justice, to execute their warrants ; and in the third place they have framed their warrants in a *general* manner, without naming the particular persons they meant to have arrested, and confining the warrants to them only, but leaving a liberty to the messengers, who are to execute the warrants, to arrest any persons whom they,

A threefold irregularity has grown up in the secretary of state's office.

The manner in which a prudent and moderate secretary of state ought to proceed in the business of arresting state-offenders.

the messengers, shall think, or say that they think, to have been guilty of the offences in question. These are strange licences that have crept into the practice of the secretary of state's office, and they sufficiently shew the violent spirit that has prevailed in it. For, if a spirit of moderation and legal caution had prevailed in it, their method of proceeding would undoubtedly have been as follows. When any offence against the state had been committed, (whether it were high treason or any lesser offence, such as a seditious libel,) they would have received and procured all the information they could get at concerning both the offence itself and the persons who had committed it; and, if they had thought that information sufficient to support a prosecution and produce the conviction and punishment of the offenders, or even, if they had thought it sufficient to justify the arresting and imprisoning them for a time, in order to prevent the execution of their dangerous designs, and in expectation of further proof against them before their trials should come on; they would have laid it before the chief justice of the King's Bench, or before some discreet

discreet and trusty justice of the peace, and have desired him, (If he thought the information sufficient, in point of law, to justify the arresting and imprisoning the offenders,) to send for the witnesses who had given the information, and to examine them himself upon their oaths, so as to take their information from their own mouths and upon oath, and then to issue his warrant in due form of law to some constable, or other fit ministerial officer of justice, to arrest the offenders and commit them to the proper prisons. This would have been the conduct of prudent and moderate men in the office of secretary of state, who had had a tender regard for the laws and liberties of their country; and it would have contributed full as much as the other way of proceeding, to the discovery and punishment of real offenders, without endangering the safety of innocent persons, or gradually tending to introduce a practice of arbitrary imprisonment at the pleasure of the king's ministers of state. And accordingly we find in a very able argument of Sir Bartholomew Shower, (who was an eminent lawyer in king William's reign,)

The cautious  
conduct of  
Sec. Coventry  
on those oc-  
casions.

In the year  
1678 the chief  
justice of the  
King's Bench  
was applied to  
for the pur-  
pose of arrest-  
ing state-of-  
fenders.

reign,) upon this subject of the pretended power of secretaries of state to commit offenders to prison, that Mr. Henry Coventry, a gentleman of great prudence and ability, who was secretary of state about the middle of king Charles the 2d's reign, did scruple to exercise this power, of committing offenders to prison, by virtue of his office of secretary of state alone, and, by the advice of Sir William Jones, the most learned lawyer of his time, procured himself to be made a justice of the peace, and took the necessary oath to qualify himself to act as such, in order that he might be enabled to make such commitments legally, when the business of his office of secretary of state should give him occasion to do so. And Sir Bartholomew says further in the same argument, that so lately as in the year 1678, (which was within his own memory,) when the popish plot had increased the number of prisoners to a wonderful degree, it was notoriously known that Sir William Scroggs, who was at that time chief justice of the court of King's Bench, was often sent for to Whitehall (that is, to the king's palace, where the privy council met,) to examine,  
and

and commit, and grant warrants: and that of late years, (that is, for some years before the year 1695, when this argument was delivered,) the principal secretaries of state had thrown that burthen, of examining and committing offenders to prison, off from themselves upon their under-secretaries, who had been sworn justices of the peace; and that Mr. Bridgeman, (who was at that time one of the under-secretaries of state,) had accordingly very often executed the office of a justice of the peace at Whitehall. There are many other things in that argument of Sir Bartholomew Shower upon this subject, that are extremely curious and interesting, and that prove very clearly, in my apprehension, that a secretary of state, in his capacity of secretary of state alone, or without being a justice of the peace, had no legal authority to commit any man to prison for any crime, however great and however positively charged, by any warrant, however particular and exact; and much less by a general warrant. But for these matters I must refer you to the argument itself, which is to be found in the fourth



fourth volume of the State Trials, page 554, &c. in the report of the proceedings between the King and Kendal and Roe, who had been committed to prison for high treason.—

But, I believe, I have said enough upon this subject to convince you, that, notwithstanding the prudence and moderation of Secretary Coventry, and, perhaps, some other gentlemen who have held the office of secretary of state in England, there has, upon the whole, been a propensity in those officers to enlarge the powers of their office, and to disregard, in the conduct of publick business, the strict restraints with which the law has circumscribed, and, as they would call it, fettered, the exercise of the royal authority.

Conclusion concerning the general *semper* and spirit that has prevailed in the secretary of state's office.

## FRENCHMAN.

Resemblance of the said spirit to a maxim that has prevailed in the French government.

I see very plainly the spirit by which they have been governed. It is not unlike a maxim that has prevailed, (as I have heard) in the French government, to which I was formerly subject; though, fortunately for Great-Britain, it has not been carried in that kingdom to near so great an extent as in France.

This

This maxim is, that the king of France acts in the government of his kingdom, on different occasions, in two distinct capacities, his ordinary capacity and his extraordinary capacity. In his ordinary capacity he exercises his power by certain known rules and certain known magistrates, such as the officers of his parliaments and other courts of justice, and other ordinary magistrates, whose jurisdictions are known and circumscribed by the known laws of the kingdom. But in his extra-ordinary capacity he exercises his power in such manner, and by the intervention of such persons, as he thinks proper;—sometimes stopping the regular proceedings of courts of justice, even in civil causes, by special orders sent to the courts for that purpose, which they dare not disobey;—at other times appointing new and special jurisdictions, or persons, to try particular causes or persons, who would otherwise be tried in the ordinary courts of justice;—and very frequently imprisoning persons, by letters *de cachet*, that is, by letters, or orders, under his signet and sign-manual, and which are executed oftentimes by officers of his army,

Of the French king's ordinary and extraordinary capacities.

for such length of time, and in such places, as he thinks fit, when, perhaps, by the ordinary course of justice, as it is administered by the ordinary magistrates of the kingdom, the persons so treated would not be liable to be imprisoned at all. This doctrine of a double capacity, in which the king of France may act, has been the source of great hardships and oppressions in that kingdom, and indeed, one may say, of all the oppressions that have been practised in it against *particular men* that have been obnoxious to the court or ministers, though *bodies of men* have sometimes been unjustly treated by means of severe publick edicts formally promulged by the kings of France in their character of legislators of that kingdom. It is true indeed that this latter character has been usurped by them, or assumed without the consent of the people, within the two or three last centuries, and that in former times they exercised their legislative authority in conjunction with the States-General of France, assembled for the purpose, in the same manner as our own gracious sovereign exercises the like authority in conjunction with the parliament of

His power of acting in his extraordinary capacity has been productive of more mischief to the people of France than his exercise of the whole legislative authority by his public edicts.

of Great Britain. But, however, the exercise of this usurped power of legislation is a much more *tolerable* species of oppression than *that other*, which arises from the doctrine of the king's having a right to act in his extra-ordinary capacity, and to employ extra-ordinary instruments of his royal will, whenever he thinks fit; because in all publick edicts that concern whole bodies of men, it is probable that, though they may be sometimes very detrimental to the publick welfare, yet some degree of decency, at least, and some appearance of reason and justice, will be preserved, in order to preserve, in some degree, the good opinion and reverence of the people, without which no government can be long secure. It would therefore be a prodigious improvement of the condition of the subjects of the king of France, if he would give up his power of acting in his extra-ordinary capacity and by the assistance of extra-ordinary instruments, though he should retain the full power of making such new laws, and imposing such taxes, as he thought fit, by his single authority by means of his publick edicts. But this is still more

Every attempt  
of the Crown  
to act in an  
extraordinary  
capacity  
ought, in a  
free country  
like England,  
to be opposed  
with vigour.

to be insisted on in a country, which, like Great-Britain, can boast of a free government. For in such a country the smallest attempt in the servants of the Crown to introduce this doctrine of a power in the king to act in an extra-ordinary capacity, or by extra-ordinary instruments of his royal pleasure instead of the ordinary magistrates and officers of justice, ought to be universally dreaded and detested, and opposed with the utmost vigour that the laws will allow. And upon this account I am sorry to hear that the secretaries of state in England have been tamely permitted to assume to themselves the power of issuing warrants to commit offenders to prison, and to employ the king's messengers, instead of the sheriffs and constables, in the execution of them, without being authorized to do so by some act of parliament. It is a practice of a suspicious and dangerous tendency.—— But now I beg you would come back to the subject we were before considering, to wit, the king's instructions to his governours of provinces, and let me know by what reason you suppose the ministers of state in England have sometimes been induced to advise their  
sovereigns,

sovereigns to delegate some powers of government to their governours of provinces by such instructions under the signet and sign-manual, rather than by their publick commissions, or letters patent, under the great seal.

## ENGLISHMAN.

The only way that I can account for this practice is by supposing that ministers of state, when they have been disposed to engage in measures respecting his Majesty's American provinces, that were not perfectly, or manifestly, agreeable to law, or that, though agreeable to law, were nevertheless of an offensive or alarming nature, have thought it a safer and quieter way of proceeding to give the governours of those provinces the necessary powers and directions for such purposes by private instructions under the king's signet and sign-manual than by the more solemn and publick method of letters patent under the great seal. By this means they have avoided the objections to them which might have arisen from those two great law-officers, the lord chancellor and the king's attorney-general, by whom all letters patent under

A conjecture concerning the motives that may have given rise to the practice of delegating some of the powers of government to governours of provinces by instructions under the signet and sign-manual.

under the great seal are inspected and examined before they pass, but who have nothing to do with instructions under the signet and sign-manual: and by this means also the powers so given to governours may be kept from the knowledge of the people of their respective provinces, if not wholly, yet at least for a time, namely, till the governours find occasion to make use of them; whereas, if they were inserted in the commissions to the governours under the great seal, which are publickly read to the people at large immediately upon every governour's arrival in his province, and are afterwards recorded in the office of the register, or clerk of the enrollments, of the province, to be there inspected by every person that is desirous of reading them, they would immediately become the object of the people's attention, and might give them some uneasiness and spread an alarm amongst them. Accordingly we see in the case of our own province of Quebec, that, so long as the delegating the powers of legislation to the governour and council only, without an assembly of the people, was a matter of a doubtful and delicate nature, it was necessary to be done of Quebec, without an assembly, by an instruction under the signet and sign manual, is a confirmation of the said conjecture.

The conduct of the Crown in the delegation of a limited degree of legislative power to the governour and council of the province

delicate nature, not clearly and manifestly within the compass of the king's legal prerogative, (which was the case until the late Quebec-act,) his Majesty's ministers of state thought fit to advise his Majesty to delegate these powers to his successive governors of this province, General Carleton and General Murray, only by an instruction under his signet and sign-manual, which accompanied their respective commissions in the years 1763 and 1768, but not to mention them in the commissions themselves under the great seal, which contained only the common clause for delegating the powers of legislation to the governor, council, and assembly. And this precaution was thought necessary to be used, notwithstanding the power of legislation thus delegated by a private instruction, to the governor and council only, was of a much narrower extent, (as we have already observed,) than that which was delegated to the governor, council, and assembly, by the commission, not being (as that was) a general power to make laws, statutes, and ordinances for the peace, welfare, and good government of the province, but only an authority to  
make



*make such rules and regulations as should appear to be necessary for the peace, order, and good government of the said province; taking care that nothing be passed, or done, that shall any ways tend to affect the life, limb, or liberty of the subject, or to the imposing any duties or taxes.* This was an authority of so very narrow an extent that it could hardly be made to answer the purposes of good government in the province; because it is almost impossible to make an effectual regulation upon any subject without in some degree affecting, if not the lives and limbs, yet at least the liberty of the persons who are to be bound by it. Yet, narrow as this authority is, you see that his Majesty did not think proper to delegate it to the governor and council of the province by his letters patent under the great seal, but only by a private instruction. But, when the act of parliament for the government of the province of Quebec had clearly and positively enabled his Majesty to appoint a council in the province, who should have power (as the act expresses it) *to make ordinances for the peace, welfare, and good government of the said province,*

When the Quebec-act was passed, a greater degree of legislative power was delegated to the governor and council by a clause in the governor's commission under the great seal.

*province, with the consent of his Majesty's governour, or, in his absence, of the lieutenant-governour, or commander in chief for the time being, and a new commission was to be given to general Carleton, grounded on the said act, this legislative authority was delegated to the governour and council in a plain, and exprefs, and ample, manner by a clause in the commission under the great seal, just as in the former commissions the same authority had been delegated to the governours, councils, and assemblies. This, I think, is sufficient to shew that, when recourse has been had to the signet and sign-manual for the delegation of any powers of government to the governours of provinces, it has been in cases in which doubts have probably been entertained by the king's ministers concerning the legal right of the Crown to delegate them at all, or in which, at least, it was apprehended that the open delegation of them by the commissions under the great seal was likely to give offence, or create uneasiness, in the provinces in which they were to be exercised. And, as for the words of reference to instructions under the signet and*

A conjecture concerning the reason of inserting in the commissions of governours of provinces under the great seal a clause of reference to powers to be delegated to them by instructions under the signet and sign-manual.

It would be more just and prudent to delegate no powers of government any other way than by an instrument under the great seal.

sign-manual, which we have before observed to be inserted in the commissions of governours, they seem to be put there in order to give to the instructions, so referred to, an appearance of partaking of the authority of the commission under the great seal, in which the said reference is made; and consequently they seem to imply a kind of acknowledgment of the legal insufficiency of the signet and sign-manual alone to convey a delegation of the powers contained in the instructions. But these appear to me to be poor shifts and unhandsome arts of government, and such as tend to no good purpose. It would, surely, be better to proceed in a plain and open way; that is, for his Majesty, in those cases in which he, in his royal wisdom, should think fit to delegate to his governours of provinces any uncommon powers of government in their respective provinces, to consider first, whether, or no, the Crown was legally intitled to exercise those powers itself and to delegate them to any other person; and, if it had a clear legal right to do so, in such case to delegate such powers to the said governours by express clauses

clauses in his letters patent to them under the great seal; but, if doubts could be entertained concerning the right of the Crown to exercise or delegate such powers, to have recourse to the supreme and indisputable authority of parliament to cause the said governors to be invested with the said necessary powers, as has been done with respect to this province by the late Quebec act. For nobody, I presume, will deny that, if it were fit *at all* to invest the governor and council of this province, without an assembly of the people, with a power of making laws for it, the proper method of doing this was by an act of parliament. The justice and utility of that, and many other of the provisions of that act, are what, indeed, we cannot easily be persuaded of: but, if they had been just and useful to us, the measure itself of establishing them by the authority of parliament must be acknowledged to be right. And the same thing ought to be done in every other case in which the king thinks any measures to be necessary to be taken in a province, which are not clearly, (beyond even the shadow of a doubt,) within the

And, if doubts are entertained concerning the legal right of the Crown to delegate the intended powers, recourse should be had to the authority of parliament for the purpose.

compass of the king's legal prerogative. And, as for instructions under the king's signet and sign-manual, they should be employed for their original and proper purpose, which is that of conveying to his Majesty's governours the directions he thinks fit to give them concerning the manner in which he would have them use the powers of government which he has before legally delegated to them under the great seal; and for no other purpose whatsoever.

These are the best conjectures I can make, (for, I acknowledge, they are but conjectures,) concerning the reasons that may have induced the ministers of state on some occasions to advise the Crown to delegate the powers of government to governours of provinces, by instructions under the signet and sign-manual, instead of the commissions, or letters patent under the great seal.

#### FRENCHMAN.

They seem, however, to be plausible conjectures, and will account tolerably well for this irregular and unjustifiable practice. And,

as

as to those words in the governour's commission which refer to the instructions under the signet and sign-manual, and seem to be intended to communicate to them in an indirect manner the authority of the great seal, they enable me to account for a difficulty which had before occurred to me relating to the ordinances of this province passed by the governour and council during the administration of General Murray. For I had observed that in the pre-ambles to several of those ordinances it is stated that they are made by the said governour, by the advice, and with the consent of his Majesty's council of the province, and *by virtue of the power and authority to him given by his Majesty's letters patent under the great seal of Great-Britain,* notwithstanding (as you some time since observed) there was no clause in his commission under the great seal that expressly gave him such a power. This seemed to me extremely strange; and I did not know how to account for it. But now I suppose that the persons who framed and passed those ordinances, must have alluded to those words in the commission under the great seal which refer

to

Of the ordinances passed by the governour and council of Quebec before the late Quebec-act.

to the powers contained in the instructions, amongst which there was a power to exercise a certain limited legislative authority by the advice and consent of the council only, and must have considered those powers in the instructions as being, in a manner, *adopted*, by such reference, into the commission, and made to partake of its authority.

### ENGLISHMAN.

There can be no other way of reconciling with truth the assertion you mention as having been made in the pre-ambls of governour Murray's ordinances. But, pray, is this assertion to be found in the pre-ambls of *all* those ordinances, or only of *some* of them? for I had imagined that in some of those ordinances the governour had fairly stated in the pre-amble that his power of making laws with the consent of the council of the province only, had been delegated to him only by his instructions. I beg you would therefore take down that little thin folio volume of our provincial ordinances, and examine the pre-ambls of them, and tell me how this is.

FRENCH-

## FRENCHMAN.

I will do so with pleasure; but I am confident that in many of them the preambles will be found to be as I have stated them. But the book will determine.—

The first ordinance is expressed in the manner you have supposed, and states the legislative authority of the governor and council of the province to have been communicated by the king's instructions. It is intitled, "*An ordinance for regulating and establishing the currency of the province*;" and the preamble of it is as follows; *Whereas his most Sacred Majesty, by his instructions to his Excellency, bearing date at Saint James's the seventh day of December, one thousand, seven hundred, and sixty-three, hath been pleased to authorize and empower his said Excellency, with the advice and assistance of his Majesty's council, to make rules and regulations and ordinances, for the better ordering and well governing of this his province of Quebec, &c.* This ordinance is dated September the 14th, 1764.

The



The next ordinance that occurs is the great ordinance of Sept. 17, 1764, for establishing courts of judicature in the province. In the pre-amble to this ordinance there are these words. *His Excellency, the governour, by and with, the advice, consent, and assistance of his Majesty's council, and by virtue of the power and authority to him given by his Majesty's letters patent under the great seal of Great-Britain, hath thought fit to ordain and declare, &c.* Here, you see, the governour affirms, that he acts by virtue of a power given him under the great seal, as I had supposed. For I had this ordinance principally in my mind, when I said that such an assertion was contained in some of the pre-ambls to the provincial ordinances; this ordinance, from its great importance and our frequent occasion to refer to it, having made a deeper impression on my memory than any other.

### ENGLISHMAN.

I must, however, observe that the governour had more reason for asserting that he acted by virtue of an authority under the great seal in passing this ordinance than in passing any other ordinance;

ordinance ; because there was a clause in his commission of governour under the great seal which expressly authorized him to erect courts of judicature in the province with the advice and consent of the council only. This clause was in these words. *And we do by these presents give and grant unto you, the said James Murray, full power and authority, with the advice and consent of our said council, to erect, constitute, and establish such and so many courts of judicature and publick justice within our said province under your government as you and they shall think fit and necessary for the bearing and determining of all causes, as well criminal as civil, according to law and equity, and for awarding execution thereupon, with all reasonable and necessary powers, authorities, fees, and privileges, belonging thereunto ; as also to appoint and commissionate fit persons in the severall parts of your government to administer the oaths mentioned in the aforesaid act, intituled, “ An act  
 “ for the further security of his Majesty’s  
 “ person and government, and the succession  
 “ of the crown in the heirs of the late princefs  
 “ Sophia, being Protestants, and extinguishing*

VOL. II.                      N n                      “ the

*“ the hopes of the pretended prince of Wales, and his open and secret abettors ;” as also to tender and administer the aforesaid declaration to such persons belonging to the said courts as shall be obliged to take the same.* By this clause in the governour’s commission it appears, that, so far as the said ordinance is employed in the erection of courts of justice in the province, it may truly be said to have been passed by virtue of an authority communicated for that purpose to the governour by his letters patent under the great seal. But, if I remember right, it does more than establish courts of justice: and, if it does, it cannot in those further particulars be said to be passed by virtue of such an authority.— But I beg you would go on to the preambles of the following ordinances.

### FRENCHMAN.

The next, or third, ordinance in the book is an ordinance for declaring what shall be deemed a due publication of the ordinances of the province of Quebec. In this ordinance there are these words. *His Excellency the governour, by and with the advice, consent,*

*sent, and assistance of his Majesty's council, and by virtue of the power and authority to him given by his Majesty's letters patent under the great seal of Great-Britain, hath thought fit to ordain and declare, &c.*

The same words are used also in the fourth ordinance, which relates to the assize of bread and the ascertaining the standard of weights and measures in the province of Quebeck; and in the fifth ordinance, which was made to ratify and confirm the decrees of the several courts of justice established in the province in the time of the military government of it; and in another ordinance made to prevent forestalling the market, and frauds by butchers, and dated on the 3d day of November in the same year 1764; and in another ordinance made on the 6th day of the same month of November, to prevent the disorderly riding of horses, and driving carts or other carriages within the towns of the province of Quebeck. In all the other ordinances in the book the words, "*and by virtue of the power and authority to him given by his Majesty's letters patent*

*under the great seal,"* are omitted. Here are therefore four ordinances, besides that for establishing courts of judicature in the province, in which it is asserted by the governour and council of this province, that they were authorized to make them by his Majesty's letters patent under the great seal. And consequently, as there is no clause in the governour's commission under the great seal which impowers him to make ordinances with the consent of the council only, without an assembly of the people, we must suppose that the gentlemen who made this assertion, grounded it on those words in the commission, which we have already spoken of, and which refer to the powers of government which then were, or afterwards should be, delegated to the governour by his instructions.--- But I am now satisfied with what you have said concerning the nature of a governour's commission under the great seal of Great-Britain and his instructions under the king's signet and sign-manual, and am fully confirmed in my former opinion of the proper difference between them, namely, that the commission alone is the instrument by which the powers of

End of the remarks on the nature of instructions to governours of provinces under the king's signet and sign-manual, begun in page 224.

of government can be legally delegated to a governour of a province, and that the instructions under the signet and sign-manual ought only to contain directions to his Majesty's governours in what manner, and under what restrictions, his Majesty would have them exercise the said powers that are legally delegated to them under the great seal. I therefore desire you would now proceed to state to me what Lord Mansfield said concerning the remaining historical examples he adduced of the king's exercising the powers of legislation over conquered countries belonging to the crown of Great-Britain; which were, if I remember right, those of the island of Minorca and the town of Gibraltar in Spain. I do not recollect that you mentioned any other places as having been cited by him on this occasion, besides those which we have already considered.

Examination of the remaining examples cited by Lord Mansfield, in support of the king's sole legislative authority over conquered countries.

## ENGLISHMAN.

Your memory does not deceive you. These were the only remaining instances his lordship mentioned in this historical part of his opinion, though in the subsequent part of it, which

Lord Mansfield's words concerning Gibraltar.

which recites the opinions of learned lawyers in support of the king's legislative authority over conquered countries, he touches upon the case of Jamaica. What he says of Gibraltar is in these words. " With regard to  
 " the inhabitants of Gibraltar, their property and trade, the king has, ever since  
 " that conquest, made orders and regulations suitable to the condition of those who  
 " live, or trade, or enjoy property in that  
 " garrisoned town."

His words concerning Minorca.

And with respect to Minorca his words are as follows. " Mr. Attorney-General  
 " alluded to a variety of instances, and  
 " several very lately, that is, within these  
 " twenty years, or thereabouts, in which  
 " the king had exercised legislation in Minorca. In Minorca it is said there are a  
 " great number of inhabitants of worth;  
 " and that a great trade is carried on. If  
 " the king does it as coming into the place  
 " of the king of Spain, because their old  
 " constitution continues, the same argument  
 " holds here: for before the 7th of October, 1763, the constitution of Grenada  
 " continued,

“ continued, and the king stood in the place  
“ of their former sovereign.” This is all  
that was said by Lord Mansfield concerning  
Gibraltar and Minorca.

## FRENCHMAN.

Pray, is the fact as it is here stated? Have  
the kings of Great-Britain, since the conquest  
of Gibraltar and Minorca, made laws for the  
inhabitants of them by their own single  
authority, or without the concurrence of  
parliament?

Of the legis-  
lative power  
that has been  
exercised by  
the Crown  
over these  
places.

## ENGLISHMAN.

I believe it is true that they have made  
some sort of laws for them on particular  
occasions, by their orders in their privy-  
councils. But the laws so made have not  
been, as far as I can find, of a very im-  
portant or interesting nature. And, I be-  
lieve, they have never imposed taxes on them.  
But, in truth, those places have always been  
considered as mere garrison-towns, or fort-  
resses built for the defence of the harbours of  
Gibraltar and Port Mahon, which have been  
retained by Great-Britain since the peace of  
Utrecht



Of Gibraltar.

Utrecht for the sake of her trade to the Mediterranean; and little, or no, attention has been paid by the people of England to the civil government of them. Indeed Gibraltar is a mere town, without an inch of territory belonging to it without the walls; and its inhabitants, (exclusive of the British garrison,) amount to no more than two or three thousand souls; and the garrison usually consists of three thousand, five hundred, men. The other inhabitants therefore may be considered;—and, I believe, they usually have been considered;—as a sort of appendage to the garrison, which is governed by the system of martial law established every year by the British parliament by the act for preventing mutiny and desertion. However, I believe it is true, as Lord Mansfield stated in the words above-cited, that the kings of Great-Britain have, ever since the conquest of Gibraltar, made orders and regulations suitable to the condition of those who live, or trade, or enjoy property in that town. And I further believe that these orders have been made by them in their privy-council. But I am not perfectly informed upon this subject.

As

As to Minorca, that is an example of somewhat greater importance than Gibraltar, because it is a place of much greater extent, and contains a much greater number of inhabitants. For it is a tolerably fruitful island, of about thirty-three miles in length, and ten miles in breadth, and contains about twenty thousand inhabitants, besides the British garrison of fort St. Philip's, which defends the harbour of Mahon. Yet even this country has been almost intirely neglected by Great-Britain as to its internal cultivation and government, and considered (like Gibraltar) as an appendage to St. Philip's castle, which defends the harbour of Mahon; and no civil governour has been ever appointed over it by the king. The Spanish laws, both criminal and civil, have been permitted to continue in it, and no attempt has been made by the English government to introduce gently and gradually, and with the consent of the inhabitants of the island, any of the English laws amongst them, nor the profession of the protestant religion. The consequence has been that they have continued bigotted Roman-Catholicks ever since they

Of Minorca

The internal cultivation and civil government of this island have been much neglected by Great Britain.

Ill consequences of the said neglect.

VOL. II.

O o

have

have been subjects of Great-Britain, and have been ill-disposed to the English government upon the ground of religion and from an aversion to hereticks, which has been constantly cherished in them by their priests and by the bishop of the neighbouring Spanish island of Majorca, who (though a subject of the king of Spain) has been permitted to come into the island of Minorca, and exercise his episcopal jurisdiction over its inhabitants. And in the beginning of the last war with France, I remember, it was said we found the ill effects of the aforesaid prejudices against our religion and government in the general disinclination of the natives to assist the British garrison in defending St. Philip's castle against the French army that invested it: insomuch that the ill policy of the British ministry, with respect to the government of the island of Minorca, both before and since the late war, (for, notwithstanding the experience they had in the late war of the disaffection of the inhabitants arising from the aforesaid prejudices, they have not altered their manner of governing it;) has been the object of general censure amongst such persons as have had

had occasion to consider it. This example, therefore, of a country so much neglected as Minorca has been by the British government, I must needs consider as having but little weight in determining the present question concerning the legislative authority of the crown of Great-Britain over conquered countries.

This neglect renders this island an example of less weight & authority than it would otherwise be, with respect to the present question.

I must also observe that the legislative authority which the kings of Great-Britain have exercised over the people of Minorca by their orders in their privy-councils, (for that is the way in which this authority has been exercised;) has been only on subjects of small importance. At least I have never heard of any others; though it is probable that, if there had been any greater exertions of legislative authority by the Crown, they would have been mentioned on the late trial of the action of Fabrigas, an inhabitant of the suburbs of St. Philip's castle in Minorca, against Lieutenant-general Moflyn, the governor of the island, for imprisoning him and banishing him from the island; because in that trial the unlimited power of the king

Of the subjects on which the Crown has exercised a legislative authority in this island.

and his delegate, the governour, were much insisted on as a ground of justification for General Mostyn. Yet it did not appear that the king had ever either imposed taxes on the inhabitants of Minorca by his proclamations, (as he did in July, 1764, on the inhabitants of the island of Grenada,) or created any new felonies, or capital crimes amongst them, or made any other laws of great importance. The only instance of the exercise of the king's legislative authority over that island that was mentioned in the course of that trial, was a certain order made by our late sovereign, king George the 2d, in his privy-council, in the year 1752, for regulating the price at which the inhabitants should be permitted to sell their wines; which was done by vesting a power in a certain publick officer, called a *Jurat*, in each of the four *terminos*, or districts, into which the whole island is divided, of fixing the price of them in his respective district. But, I presume, there have been many other orders of the king in council upon subjects of a similar nature, that is, relating to the police, or good order and publick convenience,

nience, of the island, because Mr. Wright, (who had resided in the island in the capacity of secretary to General Moltyn, the governor,) testified on that trial, "that, though the Minorquins are, in general, governed by the Spanish laws, yet the king in council, upon all occasions of application to him, issues out such orders as the case requires, and that the said orders are recorded in the Royal court there, *or the court of royal government*, (which is the great criminal and civil court of the island,) and are as binding as any laws in the island." This is all that I could ever discover concerning the legislative authority exercised by the Crown over the inhabitants of the island of Minorca. And it seems, I think, upon the whole to be but a limited and imperfect kind of legislative authority, and by no means sufficient to support the doctrine laid down by Lord Mansfield of a compleat legislative authority over conquered countries in the Crown alone, except on such subjects as have been already settled by acts of the British parliament antecedent to the conquest of them.—And to this, I must add, as a further proof of the  
obscure

Of the uncertain state of the laws in the said island.

obscure and unsettled state in which matters relating to the laws and government of that island are permitted to continue, the testimony that was given by another witness on the same trial, who had resided a great number of years in the said island, and must therefore be supposed to have been well acquainted with it. This was Col. Patrick MacCulloch, who said he had gone first to Minorca in the year 1736, and left it in the year 1750, and had gone to it again in May, 1763, and continued in it till May, 1773. This gentleman testified on that occasion, " that the Minorquins most commonly pleaded the Spanish laws, which had been allowed them after the peace of Utrecht, but that, when the laws of England were convenient for them, they pleaded the laws of England ;—that however the law which most prevailed there was the Spanish law ;—that, when the island was restored to Great-Britain by the French after the late peace in 1763, he believed nothing at all was settled with relation to the laws by which Minorca was to be governed, and that therefore the crown of Great-Britain was supposed to have received the

the Minorquins under its government upon the same footing as the French had held the dominion over them during the late war ; but that since that time the Minorquins had made interest with the king's ministers in England to have the same laws and privileges restored to them which had taken place before the island had been conquered by the French, that is, the Spanish laws ; and that the said Spanish laws had been accordingly restored." This was the substance of colonel MacCulloch's testimony. Now in a country in which it is customary for the people sometimes to plead the English laws and sometimes the Spanish, as the one or the other system happens best to suit their temporary convenience, I must needs think the state of the government too uncertain and confused to be made a solid ground of argument in a question of such importance as this we are now examining, concerning the legislative authority of the Crown alone over countries acquired by conquest.

Conclusion  
from thence as  
to the present  
question.

FRENCH-



## FRENCHMAN.

Indeed this example seems too weak a foundation to support so weighty a superstructure as that of a general and compleat legislative authority in the king alone over all the countries acquired to the crown of Great-Britain by conquest and cession, without any other restrictions than those which arise from antecedent acts of parliament, in the manner Lord Mansfield has asserted. And therefore I must conclude that the whole of the historical part of his argument in favour of this legislative authority of the Crown is insufficient for the purpose, all the former instances he had adduced of the exercise of this authority, except these two last of Gibraltar and Minorca, (to wit, those of Ireland, Wales, Berwick upon Tweed, Calais, Gascony, and New-York,) having been before shewn to be totally incapable of supporting this proposition, and some of them to be even adverse to it. We have therefore now got rid (at least, to my satisfaction,) of two of Lord Mansfield's grounds of argument in support of this doctrine, out of three, namely, of

End of the examination of the precedents, or historical examples, adduced by Ld Mansfield as proofs

of the sole legislative authority of the Crown over conquered countries.

the ground of reason and general principles of law, and the ground of historical examples. It remains that we examine his third ground of argument, which, you said, (if I remember right,) was the authority of judges and other learned lawyers, who have occasionally declared themselves to be of opinion that the Crown was possessed of this power of making laws, without the parliament, for the government of conquered countries. I therefore now desire you would inform me what my Lord Mansfield said upon this head.

Of the opinions of judges and other learned lawyers, cited by Ld. Mansfield in support of the king's sole legislative authority over conquered countries.

## ENGLISHMAN.

His words were as follows. " It is not to be wondered at that an adjudged case in point is not to be found. No dispute ever was started before upon the king's legislative right over a conquest. It never was denied in Westminster Hall; it never was questioned in parliament.

Lord Mansfield's words upon this subject.

" Lord Coke's report of the arguments and resolutions of the judges in Calvin's case lays it down as clear, that, if a king come to a kingdom by conquest— (I

The opinion of the judges, as reported in Lord Coke's report of Calvin's case, in the 7th book of his reports.

VOL. II.

P p

" omit

“ omit the distinction between a Christian  
 “ and Infidel kingdom; which as to this  
 “ purpose is wholly groundless, and most  
 “ deservedly exploded: but that strange  
 “ extra-judicial opinion of his as to a conquest  
 “ over a Pagan country will not make reason  
 “ not to be reason, and law not to be law,  
 “ as to the rest.) I say, Lord Coke in that  
 “ case lays it down as clear, “ that, if a  
 “ king come to a kingdom by conquest,  
 “ he may, at his pleasure, alter and change  
 “ the laws of that kingdom: but, until  
 “ he doth make an alteration, the antient  
 “ laws of that kingdom remain. But, if  
 “ a king hath a kingdom by descent, there,  
 “ (seeing by the laws of the kingdom he  
 “ doth inherit the kingdom,) he cannot  
 “ change the laws of himself, without con-  
 “ sent of parliament:” “ In which words  
 “ it is plain that Lord Coke means to speak  
 “ of his own country, in which there is a  
 “ parliament.” Lord Coke then goes on as  
 “ follows. “ Also, if a king hath a king-  
 “ dom by conquest, as king Henry the  
 “ second had Ireland, after king John had  
 “ given to them, (being under his obedi-  
 “ ence

“ence and subjection) the laws of England  
 “for the government of their native coun-  
 “try, no succeeding king could alter the  
 “same without parliament.” “Which is  
 “very just, and necessarily implies that king  
 “John himself could not alter the grant of  
 “the laws of England.

“Besides this opinion of the judges in  
 “Calvin’s case, the authority of two great  
 “lawyers has been cited, who took the  
 “proposition for granted. And, though the  
 “opinions of counsel, (whether acting offi-  
 “cially in a publick employment or in the  
 “capacity of private lawyers,) are not pro-  
 “perly authority to found a decision upon,  
 “yet I shall cite them on this occasion, not  
 “to establish so clear a point, but to shew  
 “that, when it has been matter of legal  
 “inquiry, the answer which it has received  
 “from gentlemen of eminent character and  
 “abilities in the profession, has been *imme-*  
 “*diately and without hesitation*, and agreeable  
 “to these principles. That opinion was as  
 “follows. In the year 1722 the assembly  
 “of the island of Jamaica having refused to

The opinion  
 of Sir Philip  
 Yorke and  
 Sir Clement  
 Wearg, (at-  
 torney and  
 solicitor ge-  
 neral to king  
 George the  
 1st,) in the  
 year 1722.

P p 2.

“grant

“ grant the usual supplies, it was referred to  
 “ Sir Philip Yorke and Sir Clement Wearg  
 “ (who were at that time the king’s attorney  
 “ and solicitor general) to consider what  
 “ could be done if the assembly should per-  
 “ sist in their refusal. They returned for  
 “ answer, “ That, if Jamaica was still to  
 “ be considered as a conquered country, the  
 “ king had a right to lay taxes upon the  
 “ inhabitants : but, if it was to be considered  
 “ in the same light as the other colonies,  
 “ no tax could be imposed upon the inha-  
 “ bitants but by an assembly of the island  
 “ or by an act of parliament.” By this  
 “ opinion of those able lawyers it appears,  
 “ that they held the distinction, in point of  
 “ law, between a conquered country and a  
 “ colony to be clear and indisputable : but  
 “ that the question, whether the island of  
 “ Jamaica, (to which the case before them  
 “ related) had remained in the state of a  
 “ conquered country, or had since become  
 “ a colony, was a matter which they had  
 “ not examined.—I have myself, upon  
 “ former occasions, traced out the constitu-  
 “ tion of Jamaica, as far as there are books  
 “ or

A short account of the settlement of the island of Jamaica.

“ or papers in the publick offices, to enable  
 “ one to do so. And I could not find that  
 “ any Spaniard remained upon the island, so  
 “ late as the Restoration: if there were any,  
 “ they were very few. A gentleman who  
 “ is well acquainted with the state of that  
 “ island, and of whom (upon hearing this  
 “ island mentioned in one of the arguments  
 “ in this cause,) I asked the question, in-  
 “ formed me, “ that he knew of no Spanish  
 “ names among the white inhabitants of  
 “ Jamaica; but that there were some a-  
 “ mongst the Negroes.” “ The method of  
 “ proceeding taken by the Crown with re-  
 “ spect to the government of that island was  
 “ this. King Charles the second, soon after  
 “ the Restoration, invited people, by his pro-  
 “ clamations, to go and settle there, promising  
 “ them his protection;—he made grants  
 “ of land there; and, for the government  
 “ of it, he appointed at first a governour  
 “ and council only, but afterwards he granted  
 “ a commission to the governour to call an  
 “ assembly. The constitution of every pro-  
 “ vince in America that is immediately under  
 “ the king, (or is governed only by his com-  
 “ mission,

Lord Mansfield's conclusion from these opinions.

" mission, without a charter,) has arisen in  
 " the same manner,----not by the grants,  
 " but by the commissions to call assemblies.  
 " And therefore, all the Spaniards having  
 " left the island of Jamaica, or been driven  
 " out of it, before the Restoration, the first  
 " settling of it after that period was by an  
 " English colony, who, under the authority  
 " of the king, planted a vacant island which  
 " belonged to him in right of his crown ;  
 " as was the case with the islands of St.  
 " Helena and St. John's, which were men-  
 " tioned by the attorney general in his argu-  
 " ment in this cause.-----To conclude there-  
 " fore ; A maxim of constitutional law sup-  
 " ported by the opinions of all the judges in  
 " Calvin's case and of two such eminent men,  
 " in modern times, as Sir Philip Yorke and  
 " Sir Clement Wearg, will, I make no  
 " doubt, acquire some authority, even if  
 " there were any thing which otherwise  
 " made it doubtful. But, on the other side,  
 " no book, no saying of a judge, no opinion  
 " of any counsel, publick or private, has  
 " been cited ; no instance has been found  
 " in any period of our history, where a  
 " doubt

"doubt has been raised concerning it.—  
 "The counsel for the plaintiff in this action,  
 "therefore, when they laboured this first  
 "point for their client, must be supposed to  
 "have done so only from a diffidence, or  
 "uncertainty, concerning the opinion we  
 "might entertain upon the second point, or  
 "the effect of the king's proclamation of  
 "October, 1763, by which he promised the  
 "people of Grenada that he would cause  
 "an assembly of the freeholders to be sum-  
 "moned in that island. But, with respect  
 "to this second point, we are, after full  
 "consideration of the subject, of opinion  
 "with the plaintiff, to wit, That before the  
 "twentieth day of July, 1764, when the  
 "letters patent establishing the duty of four  
 "and a half per cent. were issued, the king  
 "had, by his said proclamation of October,  
 "1763, precluded himself from the exer-  
 "cise of a legislative authority over the island  
 "of Grenada."

The opinion  
 of the court of  
 King's Bench  
 with respect to  
 the operation  
 of the king's  
 proclamation  
 of Oct. 1763.

This is the whole of what Lord Mansfield  
 said in support of this legislative authority of  
 the Crown over conquered countries upon  
 the ground of the opinions of judges and  
 other



other learned lawyers, in delivering that important judgement. How far it is conclusive, or satisfactory, upon the matter, I leave you to judge.

## FRENCHMAN.

Why, truly, I cannot think that there is so much weight in these authorities as my Lord Mansfield ascribes to them. For, as to the first of them, if I understand it right, it seems rather to make against the supposed right of the Crown to make laws for conquered countries, than to be favourable to it; because in the latter of the two passages which he cited from Calvin's case in Lord Coke's Reports, it is expressly declared, "that, when once king John had given the "conquered people of Ireland the laws of "England for the government of their native country, no succeeding king could "alter the same without parliament." Now, if that be true, it seems evident that the kings of England did not, in Lord Coke's opinion and that of the other judges who determined that case of Calvin, acquire, by the conquest of Ireland, *a permanent right of legislation*

A remark upon the opinion of the judges cited from Calvin's case.

*legislation* over it, so as to be able to make and unmake, and alter, the laws of it whenever, and in what manner soever, they should think fit, (as the king and parliament of Ireland do conjointly,) but only a temporary right of abrogating the antient laws of Ireland and introducing, once for all, the laws of England in their stead, which (as we have already \* observed) is a very different thing from the aforesaid proper and permanent legislative authority. And, as to the other authority mentioned by Lord Mansfield, and so much relied upon by him as of decisive importance on this question, to wit, the opinion of Sir Philip Yorke and Sir Clement Wearg, (the king's attorney and solicitor general,) in the year 1722, it must indeed be allowed to be an authority in point to the question, because those two learned gentlemen seem to have meant to ascribe to the Crown the same perfect and permanent sort of legislative authority over Jamaica, in case it was still to be considered as a conquered country, as Lord Mansfield has ascribed to it with respect to the island of Grenada before the proclamation of October, 1763: but yet I

A remark on the opinion of Sir Philip Yorke and Sir Clement Wearg in the year 1722.

VOL. II.

Qq

cannot

\* See above, page 67.

cannot think it a very respectable authority, notwithstanding the great learning and eminence of those gentlemen ; partly, because it seems to have been rather a hasty opinion, upon which they had bestowed very little consideration, since they did not take the pains to inquire whether Jamaica was to be still considered as a conquered country, or whether, by events subsequent to the conquest of it, it was become a colony ; and partly, because it may well be supposed that persons who serve the Crown in the offices of attorney and solicitor general, have, in all doubtful matters relating to the royal prerogative, a bias on their minds in favour of it. This opinion therefore ought to be considered as the hasty and ill-digested testimony of interested witnesses, and, as such, to be but little regarded.

## ENGLISHMAN.

I look upon these two authorities in much the same light as you do ; and I more especially agree with you in what you have remarked concerning the latter of them, or the opinion of Sir Philip Yorke and Sir Clement

Clement Wearg in the year 1722. Persons in their then stations must always be liable to the suspicion of inclining a little to favour the prerogative of the Crown : and, as you well observed, this opinion of theirs seems to have been given very hastily and with very little attention to the subject, since they did not take care to inform themselves concerning the then present condition of Jamaica, so as to determine whether it ought to be considered as a conquest or a colony, though this was absolutely necessary to make their opinion of any use to the ministers of state who had consulted them. It must however be confessed that, crude and hasty as this opinion seems to have been, it serves to shew that those two great lawyers had a general, loose, floating, idea of the king's being the absolute legislator of all countries acquired by conquest, which, (as I observed to you in the beginning of our conversation,) was an opinion that had been adopted by a great many private lawyers, though I never could see any sufficient foundation for it.

Q q 2

But,

Further remarks on the opinion of the judges cited from Calvin's case.

But, as to the other authority cited from Calvin's case, you would think it of still less consequence than you now do, if you knew all the circumstances that accompany it in Lord Coke's report of that case. For it is one of the most vague and desultory and extra-judicial declarations upon a subject of law that is any where to be met with in the English law-books; and this in a case in which the main decision of the point itself, that was then in question before the court, was generally complained of as contrary to law and made with a view to gratify the humour of king James the 1st, who was then upon the throne.



## FRENCHMAN.

You raise my curiosity concerning this case of Calvin, which Lord Mansfield has quoted with so much respect. I therefore beg you would give me a short account of it, and of the manner in which the passage quoted by Lord Mansfield is introduced in it.

E N G-

## ENGLISHMAN.

I will endeavour to satisfy you upon this subject as well as I am able, that we may thereby compleat our examination of Lord Mansfield's argument, in favour of this supposed legislative authority of the Crown over conquered countries, in as impartial and as ample a manner as possible.

You must know then, in the first place, that it is a maxim of the English law, that no alien, or foreigner, or person born out of the dominions of the crown of England, though he should chuse to come and settle in England, is capable of purchasing land there. This maxim has indeed a few natural exceptions, such as those of the children of Englishmen employed in foreign embassies and born in the countries in which their parents are so employed during the continuance of their employments, and of the children of English merchants settled, for the purposes of trade, in some English factory that has been established by the king's authority in the territories of some foreign

Of the law of England with respect to aliens, or foreigners.

foreign prince, or state, by the permission of such prince or state. Children born abroad under these circumstances, and, perhaps, under some other circumstances of a similar nature, are considered as natural-born Englishmen to all intents and purposes, and may purchase land in England as well as if they had been born in it. But other persons born abroad cannot do so. Thus the great numbers of people who fled into England from Flanders and the other provinces of the Netherlands, in the time of the duke of Alva's persecution, (which was in the first part of the reign of queen Elizabeth,) though they and their families settled themselves in England with queen Elizabeth's permission and approbation, and introduced some valuable manufactures into the kingdom, yet were not capable of becoming purchasers of land in it. And the case was the same with respect to Frenchmen and all other foreigners, and, among the rest, with respect to the natives of Scotland, while that was a kingdom independant of, and separate from, the kingdom of England. But, if a foreigner, settled in England, had children born in England,

England, those children were natural-born Englishmen and might purchase land as well as those whose ancestors had been settled in England from time immemorial. And even a foreigner might be rendered capable of purchasing land in England by the favour of the Crown, by means of the king's letters patent of denization under the great seal; which letters patent are so called from the French word *donaison*, a donation or gift, because they contain a gift, or donation, to the foreigner to whom they are granted, of the rights and privileges of a natural-born Englishman. What the present form of these letters patent is, I do not know: and, indeed, I believe it is not usual at this day for our kings to make any such grants; but foreigners who have desired to settle and make purchases of land in England, and obtain, as far as might be, the privileges of native Englishmen, have, for many years past, procured private acts of parliament for that purpose, which confer those privileges in a more ample manner than the king's letters patent of denization. But in queen Elizabeth's time such patents used to be granted; and

Of the denization of foreigners by the king's letters patent.



and mention is made of such a grant in Lord Coke's fifth book of Reports, folio 52, in Page's case, where it is stated that one Indy, who was owner of certain houses in the town of Lynn Regis in the county of Norfolk, which he held to him and his heirs for ever, by socage tenure, had devised them by his last will to his wife, who was an alien, or foreigner, but who had, before the death of her said husband, been made a denizen by queen Elizabeth by her letters patent under the great seal; and that the said woman, after the death of Indy, had married a man of the name of Page, who thereby became possessed of the said houses in her right; which gave occasion to the law-suit there reported by Lord Coke. This cause was determined in the 30th year of queen Elizabeth's reign, that is, in the year 1588. But Lord Coke has not inserted in his report of this case the form of the said letters patent of denization. Nor do I know of any copy of such letters patent in any law-book (though one would think there should be several,) of a later date than the reign of king Henry the 6th, who was driven from the throne by  
king

king Edward the 4th in the year 1460. I will therefore exhibit to you that antient copy of such letters patent, which, I dare say, you will join with me in considering as a matter of curiosity well worth our attention before we proceed further in the view of Calvin's case, which turns upon the doctrine of alienage and the distinction to be made between foreigners and natural-born subjects. It is contained in the old collection of reports of law-cases called the Year-books, in the reports of the cases in the 9th year of the reign of king Edward the 4th, in Trinity term, page 8. In that year of king Edward the 4th, two persons, whose names were William Swirenden and John Bagot, brought an action at law called an assise, against one Thomas Ive for disseising them (or turning them out of the possession) of the office of clerk of the crown in Chancery, which they stated to have been granted to them by letters patent of king Edward the 4th, the then reigning king. In answer to this complaint Thomas Ive pleads two different pleas with respect to his two adversaries; namely, as to John Bagot, he alledges that the said

*The case of Bagot and Ive; in the 9th year of the reign of K. Edw. 4.*

VOL. II.

R r

John

John Bagot ought not to be allowed to maintain his writ of assize against him, because the said John Bagot is a foreigner, born out of the ligeance, (or obedience) of the king of England; and, as to William Swirender, the other plaintiff, he alledges that he never had been seised (or possessed) of the said office of clerk of the crown in such a manner as to be capable of being disseised of it, and that, if he had been so seised of the said office, he, the said Thomas Ive, had not disseised him of it, or molested him in the enjoyment of it. The words of his plea with respect to John Bagot are these; *Quod idem Johannes Bigot est alienigena, genitus et natus extra ligeantiam domini regis Angliæ, videlicet, apud Ponuteys infra regnum Franciæ sub obedientia Caroli nuncupantis se regem Franciæ, adversarii et magni inimici domini regis Angliæ. Et hoc paratus est verificare. Unde, quoad prædictum Johannem Bigot, petit iudicium de brevi prædicto.* In reply to this plea, of which he does not deny the truth, John Bagot says that the late king Henry the 6th by his letters patent under the great seal of England, bearing date at Westminster on

Plea of alienage, used by the defendant Ive in abatement of the writ of assize brought by the plaintiff Bagot.

on the 3d day of November, in the 37th year of his reign, did, out of his special favour, and as a reward for the good service which the said John Bagot had rendered him, grant, for himself and his heirs, to the said John Bagot, that he, the said John Bagot, and the heirs of his body, should be, for the future, natural-born subjects and liegemen of the said king and his heirs for ever, and should be so allowed, treated, and considered on all occasions. And in proof of this allegation of such a grant of king Henry the 6th, the said John Bagot produced before the court the said letters patent themselves, which were in the words following.

*Henricus, Dei gratiâ, rex Angliæ et Franciæ, et dominus Hiberniæ, omnibus ad quos præsentis literæ pervenerint, salutem.*

Letters patent of denization, granted to John Bagot by K. Henry the 6th in the 37th year of his reign.

*Sciatis, quòd de gratiâ nostrâ speciali, et pro bono servitio quod dilectus servitor noster, Johannes Bagot, in ducatu nostro Normanniæ oriundus, nobis impendit et impendet in futurum, concessimus, pro nobis et hæredibus nostris, quantum in nobis est, præfato Johanni, Quod ipse de cætero et omnes hæredes sui, de corpore*

R r 2

suo

To be considered and treated as a natural-born subject of the king, born within the kingdom of England.

Power to bring actions of all sorts in the king's courts of justice.

Power to purchase lands.

*suo procreati et procreandi, sint indigenæ et ligei nostri, et quilibet eorum sit indigena et ligeus noster, et hæredum nostrorum; et quod ipsi in omnibus tractentur, reputentur, babeantur, teneantur, et gubernentur, sicut fideles ligei nostri infra regnum Angliæ oriundi, et quilibet eorum in omnibus tractetur, reputetur, babeatur, teneatur, et gubernetur tanquam ligeus noster infra dictum regnum nostrum Angliæ oriundus, et non aliter nec alio modo.—*

*Quòdque idem Johannes et omnes hujusmodi hæredes sui, et eorum quilibet, omnimodas actiones, reales, personales, et mixtas, in omnibus curiis, locis, et jurisdictionibus, nostris habere et exercere, eisque gaudere, ac eas in eisdem placitare, et implacitari, respondere et responderi, defendere et defendi, possint et possit, in omnibus et per omnia, sicut fideles ligei nostri in dicto regno nostro Angliæ oriundi.—*

*Et ulterius, quod dictus Johannes et hæredes sui prædicti terras, tenementa, redditus, servitia, reversiones, possessiones, quæcunque, infra regnum nostrum Angliæ et alia dominia nostra, perquirere, capere, recipere, habere, tenere, et possidere, ac eis uti et gaudere sibi et hæredibus suis, imperpetuum, vel alio modo; et ea dare,*

*dare, vendere, alienare, ac ligare, cuicunque personæ seu quibuscunque personis sibi placuerit, licitè et impunè debeant, possint, et valeant, et quilibet eorum debeat, possit, et valeat, ad libitum suum, imperpetuum, adeò liberè et quietè, integrè, et pacificè, sicut debeat, possit, et valeat aliquis ligeorum nostrorum infra regnum nostrum Angliæ oriundorum. — Et quod præfatus Jobannes et omnes bujushmodi hæredes sui, de cætero in futurum, colore, seu vigore, alicujus statuti, ordinationis, seu concessionis factæ vel faciendæ, non arctentur, teneantur, seu compellantur, nec aliquis eorum arctetur, teneatur, seu compellatur, ad solvendum, dandum, vel faciendum, aut supportandum, nobis vel alicui hæredum nostrorum, seu cuicunque, aliqua alia customas, subsidia, taxas, tallagia, seu alia onera quæcunque, pro bonis, marchandis, terris, seu tenementis, vel personis eorum, aut alicujus eorum, præterquam talia et tanta qualia et quanta alii fideles nostri, infra dictum regnum nostrum Angliæ oriundi, pro bonis, marchandis, terris, tenementis, seu personis suis propriis, solvunt, dant, faciunt vel supportant, aut solvere, dare, facere, et supportare consueverunt et tenentur ;*  
*sed*

Exemption  
from the du-  
ties payable  
by aliens, or  
foreigners.

*sed quod præfatus Johannes et hæredes sui prædicti habere et possidere valeant, et quilibet eorum habere et possidere valeat, ac habeant et possideant, omnes et omnimodas libertates, franchises, ac privilegia quæcunque, et eis uti et gaudere possint et possit, infra dictum regnum nostrum Angliæ et jurisdictiones [ejusdem], adeò liberè, et quietè, integrè et pacificè, sicut cæteri fideles ligei nostri infra regnum nostrum Angliæ oriundi, habere et possidere, uti et gaudere debeant, absque perturbatione, molestatione, inquietatione, impetitione, impedimento, vexatione, calumniâ, seu gravamine quocunque nostri vel hæredum nostrorum, justitiariorum, eschaetorum, vicecomitum, aut aliorum officiariorum, seu ministrorum nostrorum, vel hæredum nostrorum, quorumcunque; et absque fine et feodo inde quovismodo ad opus nostrum capiendo seu solvendo:—*

*Aliquibus statutis, ordinationibus, actibus, provisionibus, seu proclamationibus, in contrarium ante hæc tempora factis, editis, ordinatis, provis, seu proclamatis, aut imposterum faciendis, aut quod prædictus Johannes Bagot in dicto ducatu nostro Normanniæ fuit oriundus, aut aliquâ [aliâ] causâ,*

Clause of *Non obstante*, to all statutes, &c. to the contrary.

*causâ, vel materiâ, quâcunque, non obstantibus.—In cujus rei testimonium has literas nostras fieri fecimus patentes.*

*Teste Me ipso, apud Westmonasterium, tertio die Novembris, anno regni nostri tricesimo septimo.*

These letters patent are exceedingly verbose and full of tedious expressions that are almost synonymous to each other. But the purport of them is to grant to the said John Bagot the four following privileges; to wit, 1st, In general terms, that he and his children shall be treated and considered on all occasions as natural-born Englishmen; 2dly, That he and his children shall have a right to bring actions of every kind in all the English courts of justice; 3dly, That he and his children shall be at liberty to purchase, or acquire, land in England, in the same manner as if they had been born in England; and 4thly, That he and his children shall be exempted from paying the extraordinary duties paid by aliens upon the importation of goods into England, and all other payments to the Crown of every kind, to which foreigners

The purport of the foregoing letters patent.



reigners residing in England were liable ; of which four privileges the three last are contained in the first, and are only specifications of the principal subjects to which it might be applied.

These letters patent are called in the Year-book *letters patent of legitimation*.

I must also observe that in the report of that case of *Bagot and Ive* in the Year-books, these letters patent are called letters patent of *legitimation*, though the more modern name for them is that of letters patent of *denization*.

Having premised thus much concerning the law of alienage, and the necessity of letters patent of denization in order to enable an alien, or foreigner, to purchase land in England, I will now endeavour to state to you a short abstract of Calvin's case, which relates singly to this doctrine.

An abstract of Calvin's case, in the 7th book of Lord Coke's Reports.

In the 6th year of the reign of king James the first an action at law, called an assise, was brought by the guardians of an infant of three years of age whose name was Robert Calvin, in the name of the said infant, against two persons named Richard and Nicholas

Nicholas Smith, for a freehold house in the parish of St. Leonard, Shoreditch, near London, of which it was said they had disseised (or dispossessed) the said Robert Calvin. To this complaint the said Richard and Nicholas Smith say, that the said Calvin has no right to bring the said action, and that they are not bound in law to answer his complaint, because he is *an alien born*, having been born at Edenborough in Scotland on the 4th day of November in the 39th year of the reign of the then reigning king, James, over his kingdom of Scotland, and in the 3d year of his reign over his kingdoms of England and Ireland; which birth of the plaintiff at Edenborough they alledge to be within the king's allegiance of his kingdom of Scotland, but without his allegiance of his kingdom of England; and they alledge further that at the time of the birth of the said plaintiff, and before and since, Scotland was governed by its own peculiar laws, and not by the laws of England. To this it is replied for the said Robert Calvin, that this plea is not sufficient in law to bar him from having an answer to his said action. And this is the

Plea of alienage, in abatement of the writ of assize brought by the plaintiff Calvin; because of his birth in Scotland since the accession of king James to the crown of England.

Allegation that Scotland and England are governed by different laws.

Replication of the plaintiff Calvin.

The question  
resulting  
therefrom, for  
the decision of  
the judges.

question which is left to the decision of the judges; which is, in other words, whether, or no, persons born in Scotland since the accession of the king of Scotland to the crown of England, (who were, upon that occasion, called *postnati*,) could maintain actions for lands in England, which it was confessed on all hands that persons that were born aliens, and under the allegiance of a foreign king, could not do.

This case was argued very fully, first, by the most able and learned counsel at the bar, and afterwards by all the judges, (in number fourteen,) and the lord chancellor; and it was at last determined by the lord chancellor and twelve of the judges in favour of Calvin, the plaintiff, to wit, that he was *not* to be considered as an alien born, but as a natural-born subject of England, and might possess land in England, and maintain an action for the recovery of it.

Of the different kinds of allegiance to the same king, mentioned in the plea of the defendants,

In the course of the arguments delivered in this cause there was a great deal said upon the doctrine of allegiance, and whether or no there could be two kinds of allegiance to the same king,

king, an allegiance to him as king of one of his kingdoms and a different allegiance to him as king of another kingdom, according to the distinction suggested in the defendant's plea. And it was determined that there could not; and, consequently, that the being born under the king's allegiance, as king of Scotland, was equivalent to the being born under his allegiance as king of England, with respect to the privileges that belonged to the latter birth in the kingdom of England. But the reasons alledged by Lord Coke as the grounds of this opinion do not appear to me very satisfactory, and were not esteemed so by many of the lawyers of that time. However, as this matter is not much connected with the subject of our present inquiry, which is the power of the crown of England over countries acquired by conquest, I shall say nothing further about it.

After discussing the question concerning the two sorts of allegiance due to king James in his two capacities of king of England and king of Scotland, which is the first ground

S s 2

of

Of the consequences that result from the difference of the laws that prevail in the two kingdoms of England and Scotland.

of argument suggested in the defendants plea, the judges proceed to consider the other ground of argument suggested in the said plea by the allegation that the kingdom of Scotland is governed by a different system of laws from that which takes place in England.

Upon this matter they reason strangely, and affirm that allegiance is due from subjects to their king, not by the laws of the land, but by the law of nature; and therefore that, as the law of nature (which is the foundation of allegiance,) is the same in both kingdoms; the diversity of the laws of the two kingdoms in other respects is of no importance with respect to the doctrine of allegiance, and to the privileges of a natural-born subject which result from it.

Of the points in which the two kingdoms were become united, and those in which they still continued separate.

They then, in the 3d place, consider in what points the two kingdoms of England and Scotland were become one by the accession of king James to the crown of England, and in what points they still continued separate; and determine that they continued separate with respect to their laws, their parliaments, and their bodies of peerage or nobility.

They

They then, in the 4th place, consider the nature of *alienage*, and lay down the rules of law upon this subject; as, who is to be considered as *alienigena*, or an *alien born*; and how many kinds of *aliens* there are, as *alien amys*, or *alien friends*, namely, the subjects of princes in alliance, or amity, with the king of England; and *alien enemies*, namely, the subjects of princes at war, or at enmity, with the king of England; and the privileges and incidents belonging to these several sorts of aliens. And under this head it is that Lord Coke introduces what he says concerning conquered countries, from which Lord Mansfield cited the passage above-mentioned. And here, that you may the better judge of the drift and meaning of the said passage, I will recite to you the whole paragraph, or head of argument, of which it makes a part; which is as follows.

Of the different sorts of aliens.

“ Every man is either *alienigena*, an alien-born, or *subditus*, a subject-born. Every alien is either a friend that is in league, &c. or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for

The whole passage of Ld. Coke upon this subject.

Of alien  
friends.

for a time, or *perpetuus*, perpetual, or *specialiter permissus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made: and of these briefly in their order. An alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the kings and princes in Christendom being now in league with our sovereign; but a Scot being a subject, cannot be said to be a friend, nor Scotland to be *solum amici*) may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure, or personal goods whatsoever, as well as an Englishman, and may maintain any action for the same: but lands within this realm, or houses (but for their necessary habitation only) alien friends cannot acquire, or get, nor maintain any action real or personal; for any land or house, unless the house be for their necessary habitation. For, if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffick. which is the life of every island. But if this alien become an enemy (as all alien friends may) then is he utterly disabled to maintain any action,

or

Of aliens, that  
are temporary  
enemies.

or get any thing within this realm. And this is to be understood of a temporary alien, that, being an enemy, may be a friend, or, being a friend, may be an enemy. But a perpetual enemy (though there be no wars by fire and sword between them,) cannot maintain any action, or get any thing within this realm. All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility): for between them, as with the devils, (whose subjects they be,) and the Christian, there is perpetual hostility, and can be no peace; for, as the apostle saith, 2 Cor. vi. 15. *Quæ autem conventio Christi ad Belial, aut quæ pars fidei cum infidei?* and the law saith, *Judæo Christianum nullum serviat mancipium: nefas enim est quem Christus redemit, blasphemum Christi in servitutis vinculis detinere.* Register 282. *Infideles sunt Christi & Christianorum inimici.* And herewith agreeth the book in 12 H. 8. fol. 4. where it is holden that a Pagan cannot have or maintain any action at all. [*Quære.*]

Of aliens, that  
are perpetual  
enemies.

Of Infidels.

And



Of the laws  
of conquered  
countries.

Of a Christian  
country that is  
conquered.

Of an Infidel  
country that is  
conquered.

Of the laws of  
a kingdom  
that accrues  
to a king by  
descent.

“ And upon this ground there is a diversity between a conquest of a kingdom of a Christian king, and the conquest of a kingdom of an Infidel. For, if a king come to a Christian kingdom by conquest, seeing that he hath *vita & necis potestatem*, he may at his pleasure alter and change the laws of that kingdom ; but, until he doth make an alteration of those laws, the ancient laws of that kingdom remain. But, if a Christian king should conquer a kingdom of an Infidel, and bring them under his subjection, there *ipso facto* the laws of the Infidel kingdom are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the Decalogue ; and in that case, until certain laws be established amongst them, the king, by himself, and such judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said. But, if a king hath a kingdom by title of descent, there, seeing that by the laws of that kingdom he doth inherit the kingdom, he cannot change

change those laws of himself, without consent of parliament. Also if a king hath a Christian kingdom by conquest, as king Henry the second had Ireland, after king John had given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding king could alter the same without parliament. And in that case, while the realm of England, and that of Ireland, were governed by several laws, any that was born in Ireland was no alien to the realm of England. In which precedent of Ireland three things are to be observed: 1. That then there had been two descents, one from king Henry the 2d to king Richard the 1st, and another from king Richard to king John, before the alteration of the laws. 2. That albeit Ireland was a distinct dominion, yet the title thereof being by conquest, the same by judgement of law might by express words be bound by act of the parliament of England. 3. That albeit no reservation were in king John's charter, yet by judgement of law a writ of *error* did lie in the King's Bench in England of an erroneous judgement in the

Of the legislative authority over Ireland.

Vol. II.

T t

King's

King's Bench of Ireland. Furthermore, in the case of a conquest of a Christian kingdom, as well those that served in wars at the conquest, as those that remained at home for the safety and peace of their country, and other the king's subjects, as well *antenati* as *postnati*, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in England."

End of the paragraph cited from Calvin's case.

Remarks on the said paragraph,

You see that the principal design of Lord Coke in this whole paragraph is to settle the proper distinctions between alien friends and alien enemies, and between alien enemies of a temporary kind, and aliens that are perpetual enemies, which he says is the case with all Pagans, or unbelievers in the Christian religion; and that the introduction of the doctrine of the subjection of conquered countries to the Crown is foreign to the subject under consideration, and arises merely from the mention of the distinction between alien enemies that are Christians and aliens that are unbelievers in Christianity, and is intended merely

merely to confirm that distinction by shewing that a like distinction takes place with respect to the laws of a Pagan and a Christian country upon a conquest of them. The author's view is not to shew that the king of England alone (in contradistinction to the king and parliament conjointly) has the power of altering the laws of a conquered country in either case; but to declare that, upon the conquest of a Pagan country by the crown of England, all the laws of the country are instantaneously abolished by the mere conquest itself, without any declaration of the Crown for the purpose; whereas, upon the conquest of a Christian country, the old laws continue in force until they are expressly abolished by the conqueror. This is the main proposition here laid down by Lord Coke: and this proposition is justly ridiculed and rejected by Lord Mansfield, as illiberal and extra-judicial, and as having been most deservedly exploded. Now it is certain that, if this main proposition, concerning the different fates of the laws of Christian and Pagan countries upon a conquest by the crown of England, is extra-judicial, the incidental declaration contained in it, concerning the

T t 2

king's

The principal object of Lord Coke in the said paragraph.

The main proposition of Lord Coke in this paragraph is extra-judicial.

So likewise is the incidental declaration contained in it, concerning the legislative authority over conquered countries.

king's power of making new laws in the said conquered countries, is no less so, having not the smallest connection with the only question in the cause then under consideration, which was, whether a person born under the king's allegiance in Scotland since the king's accession to the crown of England, was to be considered as intitled to the same privileges of purchasing land, &c., in England as if he had been born in England. Upon this ground, therefore, of its being extra-judicial, it ought to be treated with little regard, as well as the other opinion concerning the laws of Pagan and Christian countries, which Lord Mansfield treats with so much contempt.

And therefore it deserves but little regard.

But, such as it is, it does not favour the opinion of the permanent authority of the Crown to make laws for conquered countries.

But, besides the circumstance of its being extra-judicial, we may observe that the words of this declaration seem to relate only to the power of settling the laws of a conquered country *once for all*, immediately upon the conquest of it, and *not to the permanent legislative authority* over it, or the perpetual power of making and altering its laws whenever the Crown shall think it necessary. For these

these words (omitting what is said about the conquest of Pagan countries) are as follows.

" If a king come to a Christian kingdom by conquest, seeing that he hath *vita et mortis potestatem*, [that is, the power of life and death,] he may at his pleasure alter and change the laws of that kingdom : but, until he doth make an alteration of those laws, the antient laws of that kingdom remain."—" Also, if a king hath a Christian kingdom by conquest, as king Henry the 2d had Ireland, after king John had given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding king could alter the same without parliament."—" In which precedent of Ireland it is to be observed, that, albeit Ireland was a distinct dominion, yet, the title thereof being by conquest, the same by judgement of law might by express words be bound by act of the parliament of England." These three short passages are all that relate to the legislative authority to be exercised over conquered countries. And they seem to me to contain these two propositions; to wit, 1st, That immediately after the conquest, the king

Arepetition of the words that contain the said incidental declaration.

Two propositions that are contained in the said words,

king alone, without consent of parliament, having the power of life and death over the conquered people, may chuse whether he will permit the old laws of the conquered country to continue in force; or whether he will abolish them and introduce the laws of England in their stead; and 2dly, That, if he takes the latter course and gives the conquered people the laws of England, he cannot afterwards make any alteration in them without consent of parliament; and consequently that the king and parliament conjointly, and not the king alone, becomes possessed of the permanent right of legislation over such countries; which is a conclusion directly contrary to that which Lord Mansfield deduces from these celebrated and much-agitated passages.

The latter of the said two propositions is contrary to Lord Mansfield's opinion.

I am sensible this observation of mine is but a repetition of that which you made some time ago upon your first hearing the foregoing passages from Lord Coke's report of Calvin's case, as they were quoted in Lord Mansfield's judgement. But I thought it was worth while to mention it a second time after the

the account I have been giving of that case, and the recital of the whole paragraph and head of argument in which those passages occur, which has enabled us to judge better than we could at first of the true drift and meaning of those passages, and of the stress it is reasonable for us to lay upon them. We may now therefore conclude, from sufficient grounds and premisses, that this extrajudicial opinion of the judges in Calvin's case is not a very weighty authority upon this subject, and that, such as it is, it makes rather *against* than *for* the doctrine of the sole legislative authority of the Crown over conquered countries, which Lord Mansfield has adduced it to support.

Conclusions concerning the opinion of the judges contained in the foregoing passage of *Ld. Coke's report of Calvin's case.*

### FRENCHMAN.

I am obliged to you for this account of that famous case, in the report of which these passages concerning conquered countries are contained. For it has not only been matter of amusement to me, but has enabled me to form a more positive and better-grounded opinion concerning the meaning of them than I could have done without it. And the result is, that I am confirmed in the opinion



opinion I originally formed concerning them, when you first mentioned them as cited by Lord Mansfield, and which, I am pleased to see, agrees perfectly with your manner of understanding them. I have nothing, therefore, further to say concerning them but that I am extremely surprized that Lord Mansfield, or any body else, should ever have cited these passages of Calvin's case as a proof of the permanent legislative authority of the Crown over conquered countries, when, in truth, they contain a plain denial of it, in those words which declare, that, when once king John had granted to the conquered people of Ireland the laws of England for the government of that country, no succeeding king could alter the same without parliament. This is a matter which, I confess, surprizes me, and which I cannot easily account for.

### ENGLISHMAN.

A conjecture concerning the cause of Lord Mansfield's having cited the aforesaid passage from Calvin's case in

Nor can I with any degree of certainty. But it seems to have arisen chiefly from the want of the necessary distinction, which we made some time ago when we were considering what Lord Mansfield had said concern-

ing support of the king's sole legislative authority over conquered countries, though in truth it makes against the said authority.

ing Ireland, between the power of introducing into the conquered country, by a single act of authority, immediately upon the conquest, the laws of the conquering country, and the proper and permanent power of legislation over it, or the power of making, and unmaking, and altering, the laws of it at pleasure, at any time after. For Lord Coke certainly does ascribe the former power to the Crown alone, but the latter to the king and parliament conjointly.—But I think we have dwelt long enough upon the consideration of this famous authority:—unless you have still something further to offer concerning it.

## FRENCHMAN.

I have nothing further to offer concerning this authority, with respect to which I am perfectly satisfied: But I have one historical question to propose to you concerning the case itself in which this authority occurs; I mean, Calvin's case.—I think you said that the decision of that case had given offence to many people in England, and been considered as an effect of the servility of the

VOL. II.

U u

judges

judges who decided it, and their disposition to fall in with the wishes and humour of the court. Now I should be glad to know what interest king James the 1st could have in the decision of that cause, and why he should be supposed to have taken any concern in it.

## ENGLISHMAN.

Of the concern shewn by K. James the 1st to have his Scotch subjects, born after his accession to the crown of England, considered as natural-born Englishmen.

Commissioners are appointed by the two kingdoms to treat about an union of the same. In 1603.

King James the 1st, almost immediately after his accession to the crown of England, (which was on the 24th of March, 1602, or, according to our present style, 1603,) endeavoured with the utmost eagerness and anxiety to bring about an union between his old and new subjects, the people of Scotland and the people of England, in as many points as possible. In compliance with this strong desire of the king, an act of parliament was passed in England in the first year of the king's reign, by which certain commissioners of England were appointed to meet with commissioners of Scotland, and to treat with them upon this subject; and in the end the commissioners were directed to prepare three schedules, or copies in writing, of such propositions

positions as they should agree upon for the furtherance of this good design; of which copies one was to be delivered to the king, another to the parliament of England, and the third to the parliament of Scotland.

The commissioners of both nations accordingly met in the king's palace at Westminster, in a large room there, called *the painted chamber*, in the second year of the king's reign, that is, in the year 1604, and treated long together upon this subject; and, in the end, they made written schedules of the propositions they had agreed upon, and delivered them to the king and the two parliaments of England and Scotland, agreeably to the directions which had been given them. The schedule for the parliament of England was presented to the parliament by Sir Thomas Egerton, Lord Ellesmere, who was at that time lord high chancellor of England, and one of the commissioners for England at this treaty. It was presented by him on the first day of the session of parliament holden in the third year of the reign of king James the 1st, or in the year 1605, before the king himself, the Lords spiritual and temporal,

Proceedings  
of the said  
commissioners  
in the year  
1604.

Their proposals are presented to the English parliament in the year 1605.

U u 2 and

and the Commons of England, who were all assembled in the upper house of parliament. But the consideration of that schedule was, by another act of parliament made in that session of the 3d year of king James's reign, deferred until the then next session of parliament.

And are taken  
into consideration in the  
year 1606.

The purport  
of the said  
proposals,

In the said next session of parliament, which was held in the 4th year of the reign of king James the 1st, or in the year 1606, the said schedule was taken into consideration separately by the house of Lords and the house of Commons. The material parts of it consisted of these four propositions; to wit, 1st, That all hostile laws of either nation one against the other, might be abolished; and these laws were enumerated in the schedule; 2dly, That a certain course should be taken for the facilitating of commerce and merchandizing by the merchants of both nations, both with each other and with foreigners; and 3dly, That the common law of both nations should be declared to be, that all persons born in either kingdom *since* his Majesty's accession to the crown of England

land were to be considered as natural-born subjects in both kingdoms; and, in the 4th place, That acts of the two parliaments of England and Scotland should be passed for the benefit of all persons born in either kingdom *before* his Majesty's accession to the crown of England, so as to make them also be considered as natural-born subjects in both kingdoms as well as those persons who were born *since* the said accession; but with certain cautions and restrictions with respect to the privilege of holding great offices under the Crown, and offices of judicature, and of having voice in parliament, and with a saving of the king's prerogative.

Upon the two first articles, (which related to the abolition of hostile laws and the encouragement of trade,) the Lords and Commons had sundry conferences together in *the Painted-chamber*; and, in effect, they agreed to give way to the substance of them. But, as to the third article, the Commons could not assent to declare the law in the manner therein proposed; and thereupon they appointed a committee of their own members to confer with

The house of Lords has conferences with the house of Commons upon the said proposals.

The Commons object to the third proposition of the commissioners, concerning the *post nati*.

with a committee of the Lords concerning this article ; who, accordingly, met for this purpose on the 25th day of February, 1606, in the *Painted-chamber*. In this conference Sir Edwin Sandys delivered the principal objections of the Commons to the said third proposition concerning the *post nati*, and the Lord Chancellor Egerton was the principal speaker on the other side of the question. But, as the Commons adhered to their opinion, the committee of the Lords on the following day desired the judges who attended them, to deliver their opinions upon the matter ; which they accordingly did in favour of the *post nati*. The judges who spoke on this occasion, were Sir John Popham, the lord chief justice of the King's Bench, Sir Edward Coke, chief justice of the Common Pleas, and Sir Thomas Fleming, chief baron of the Exchequer. The other judges, who declared that they agreed with these three in opinion, were seven in number ; and their names were Justice Fenner, Justice Williams and Justice Tanfield, all judges of the King's Bench, Justice Warburton and Justice Daniel, judges of the court of Common Pleas, and  
Baron

The judges  
deliver their  
opinion in fa-  
vour of the  
*post nati*.

Baron *Snig* and Baron *Altham*, barons of the Exchequer. So that there were ten judges in all, who concurred in this opinion. These were all the judges that were present on this occasion, except Judge *Walmesley*; and he was of a different opinion.

This opinion was extremely agreeable to king James, not only because it promoted his favourite design of uniting the two nations in as many points as possible, but because it confirmed the opinion which he himself had been taught by his crown-lawyers to entertain upon the subject, and which he had, somewhat imprudently, declared to the people in an authoritative manner in one of his proclamations. This circumstance, of its having already been declared by the king in his proclamation to be law, and that of its having been taken to be so by the commissioners of the two nations, and proposed by them, in their third proposition, to be so declared by parliament, are alledged by Lord Chancellor Ellesmere, in his argument at the conference upon this subject between the two houses of parliament, to be strong reasons for declaring  
this

King James had already declared his opinion in favour of the *post nati* by a proclamation.

This circumstance was urged by the Lord Chancellor to the house of Commons, as a reason for declaring the law to be so.



It seems probable that this reason might somewhat influence the opinion given by the judges.

this opinion to be agreeable to law, unless it should be most clearly contrary to it; it not being for the king's honour that his declared opinion should be contradicted. And therefore we may well suppose that this consideration had some little influence on the minds of the judges to determine their opinion in favour of the *post nati*, unless they had thought the law to be clearly otherwise beyond all possibility of doubt.

The Commons were not convinced by the opinion of the judges.

The king mentions the subject in a speech to the parliament, some weeks after the delivery of the said opinion of the judges

Passages of the king's speech, relating to this subject.

But, whether the judges acted partially or impartially in delivering this opinion, it is certain that it did not convince the house of Commons that the law was so; which gave occasion to king James to mention the matter to his parliament in a very long speech, which he delivered to them from the throne on the 31st day of the ensuing month of March, that is, about five weeks after the judges had delivered this opinion. In this speech there are the following passages. " But for the "*Post nati*, your own lawyers and judges, " at my first coming to this crown, informed " me, there was a difference between the "*Ante* and the *Post Nati* of each kingdom : " which

" which caused me to publish a proclamation  
 " that the *postnati* were naturalized, *ipso*  
 " *facto*, by the accession to the crown. I  
 " do not deny that judges may err, as men;  
 " and therefore I do not press you here to  
 " swear to all their reasons: I only urge, at  
 " this time, the conveniency for both king-  
 " doms, neither pressing you to judge nor  
 " to be judged. But remember also, it is as  
 " possible, and likely, that your lawyers may  
 " err as the judges. Therefore, as I wish  
 " you to proceed here in so far as may tend  
 " to the weal of both nations, so would I  
 " have you, on the other part, to beware  
 " to disgrace either my proclamation or the  
 " judges, who, when the parliament is done,  
 " have power to try your lands and lives:  
 " for so you may disgrace both your king  
 " and your laws: for the doing of any act  
 " that may procure less reverence to the  
 " judges, cannot but breed a looseness in the  
 " government and a disgrace to the whole  
 " nation."-----" In any case wherein the  
 " law is thought not to be cleared (as some  
 " of yourselves do doubt that, in this case  
 " of the *postnati*, the law of England doth  
 Vol. II. X x " not

“ not clearly determine,) then in such a  
 “ question, wherein no positive law is refo-  
 “ lute, *rex est judex*; for he is *lex loquens*,  
 “ and is to supply the law where the law  
 “ wants.” By these passages in this speech  
 of king James we may perceive how anxious  
 the king was to get this point relating to the  
*postnati* settled in their favour.

Names of the  
 lawyers who  
 argued for the  
 Commons at  
 the conference  
 with the  
 Lords.

The lawyers who argued on the side of  
 the house of Commons in the conference  
 with the committee of Lords, before the  
 judges delivered their opinion, were Dod-  
 ridge, the king's solicitor general, (who was  
 afterwards a judge,) and Lawrence Hyde,  
 (who was afterwards chief justice of the  
 King's Bench, and was uncle to the famous  
 earl of Clarendon, lord chancellor to king  
 Charles the second,) Brook, Crew, and  
 Hedley, all professors of the Common Law,  
 according to the expression of Serjeant Moore,  
 (from whose reports the foregoing account of  
 this proceeding is taken) that is, as I suppose,  
 serjeants at law; which degree of serjeants  
 is the highest degree of learning that belongs  
 to the profession of an advocate, or barrister  
 at

at law, in England. You see therefore, by these respectable names of lawyers who maintained a different opinion from the judges upon this question, how far it was from being considered at that time as a clear point in favour of the *postnati*, and likewise how warmly it was agitated and contested, as a matter of capital importance. In short, after all these debates and opinions and speeches, the House of Commons adhered to their first opinion, and could not be brought to consent, either, to declare by an act of parliament, that the law was already as the king and the judges had laid it down, (as the commissioners of the two nations had recommended in their third proposition,) or to alter the law, and make it so for the future. But the thing went off at that time, and the third proposition of the commissioners of the two nations did not take effect. The Commons, however, agreed to abolish the hostile laws that were then in being against the Scots, and an act of parliament was accordingly passed for that purpose.

The Commons adhered to their first opinion notwithstanding the opinion of the judges.

But they agreed to abolish the hostile laws against Scotland.

X x 2

This

The affair of the *postnati* was revived two years after by Calvin's case, in the year 1608;

and then was determined judicially in favour of the *postnati*.

The judges were blamed for this decision, as having been influenced by a desire to gratify K. James's humour.

The words of Mr. Wilson, the historian, upon this subject.

This affair of the *postnati* seems to have rested here for about two years, and was then revived by the action above-mentioned brought in the name of the infant, Robert Calvin, against Richard and Nicholas Smith, for the possession of a freehold house near London; and was then determined in a judicial manner by the resolution of the judges in favour of the *postnati*; which resolution has ever since been allowed to be the law upon this subject. But the judges on this occasion were supposed by many people to be influenced by a desire of gratifying the king's humour, as well as on the former occasion, when they delivered their opinion before the committees of the houses of Lords and Commons. For I find that Mr. Wilson, in his history of the life and reign of king James the 1st, speaks of their conduct in this matter in severe terms. After giving an account of the debates in parliament upon this affair of the union of the two kingdoms and the privileges of the *postnati*, he has these words.

“ The parliament only feared, that the king's  
 “ power would have such an influence upon  
 “ the judges of the kingdom, that the Scots  
 “ would

“ would be naturalized too soon ; (they were  
 “ resolved not to be accessary to it;) which  
 “ indeed some two years after was confirmed  
 “ in *Calvin's* case of *post-nati*, reported by  
 “ the Lord Chief Justice *Coke*, (who was fit  
 “ metal for any stamp royal,) and adjudged  
 “ by him, and the Lord Chancellor Elles-  
 “ mere, and most of the judges of the king-  
 “ dom, in the Exchequer-chamber, though  
 “ many strong and valid arguments were  
 “ brought against it. Such power is in the  
 “ breath of kings, and such soft stuff are  
 “ judges made of, that they can vary their  
 “ precedents, and model them into as many  
 “ shapes as they please.” This Mr. Wilson  
 is an original writer, who lived in the time  
 of which he writes, and all through the fol-  
 lowing reign of Charles the 1st, and is the  
 most copious historian that is extant of the  
 reign of king James the 1st. We may  
 therefore reasonably believe that the censures  
 he here passes upon Lord Coke and the other  
 judges, on account of their decision of Cal-  
 vin's case, were such as he had often heard  
 bestowed upon them at the time of that  
 transaction by the popular men of that age.—

This

End of the  
account of the  
affair of the  
*poignati*.

This is the best account I am able to give you of the occasion of the dissatisfaction of many people with the judges for their conduct in that business, and of the ground of the suspicion that was then entertained of their having decided this question in the manner they did, from a desire to gratify the king.

### FRENCHMAN.

I am obliged to you for the trouble you have taken to satisfy my curiosity on this subject, and have now nothing further to ask concerning it.—We may therefore now return to the original subject of our inquiry, to wit, the power of the Crown to make laws for the inhabitants of conquered countries, if there remains any thing further to be said upon it. I therefore beg you would resume the consideration of this question.

### ENGLISHMAN.

I would do so with pleasure, if the subject were not exhausted. But I believe we have gone through all the branches of Lord Mansfield's argument in support of the sole legislative

tive authority of the Crown over conquered countries, and have given them a very full and fair examination : which is all I proposed to do upon the subject. For, as to my own opinion upon it before that decision of Lord Mansfield, I have already mentioned it to you in the beginning of our conversation, together with the reasons upon which I grounded it, and had the satisfaction of finding that you intirely agreed with me in both, and even anticipated some of the latter. What effect the mere authority of Lord Mansfield, sitting in his judicial capacity, as chief justice of the court of King's Bench, and delivering a contrary opinion, but grounding it on reasons that we think weak and unconvulsive, ought to have upon our minds, I will not pretend to determine. But it is hard to give up one's reason to mere authority.

#### FRENCHMAN.

So hard that I shall not do it. This is too important a point to be settled by a single decision of a court of justice, or, perhaps I ought rather to say, by the opinion of a single judge. For, by what you stated to me of  
that



An inquiry, whether the opinion of Ld. Mansfield concerning the power of the Crown over conquer'd countries, delivered in the judgement in the case of Campbell and Hall, ought to be considered as the opinion of the other judges of the Court of King's Bench.

that judgement in the case of Campbell and Hall, it does not appear to be quite certain that all the judges of the court of King's Bench concurred with Lord Mansfield in opinion upon that first point of the cause. For, since, as Lord Mansfield expressly declared, they all agreed that the plaintiff Campbell was intitled to the judgement of the court upon the second point, to wit, that the king, if he had had the sole legislative authority over the island of Grenada immediately after the conclusion of the treaty of Paris in February, 1763, had nevertheless precluded himself, by his proclamation of October, 1763, from exercising it from that time forward, and had thereby transferred the said power to the future governours, councils, and assemblies of the said island; I say, since all the judges agreed with Lord Mansfield in the opinion that the plaintiff Campbell ought to have judgement upon this second ground, it is possible that they might not concur with him in his opinion upon the first point, concerning the king's original legislative authority over that island before the said proclamation of October, 1763.

1763. Unless, therefore, it was expressly declared by Lord Mansfield (who seems to have been the only judge that spoke upon that occasion) that the other judges concurred with him in that opinion upon the first point, I do not think we are bound to consider it as being their opinion. I therefore should be glad to know whether Lord Mansfield expressly declared that the other three judges of the court did concur with him in that opinion.

### ENGLISHMAN.

I do not find that he did make such a declaration, though, with respect to the second point, he expressed himself in these positive words; "But, after full consideration, we are of opinion, that before the 20th of July, 1764, the king had precluded himself from the exercise of a legislative authority over the island of Grenada." There is therefore a possibility that your surmise may be true, that the other judges did not agree with him in opinion upon the said first point. Yet their silence on the occasion seems to imply an

VOL. II.

Y y

assent

affent to what he delivered. So that I don't know what to conclude concerning that matter. All that is certain is, that the other judges did not openly declare their concurrence with Lord Mansfield in this opinion.

### FRENCHMAN.

Well, be that as it may; whether they did, or did not, concur with Lord Mansfield in that opinion, I confess I cannot bring myself to accede to it, after having seen the weakness of the reasons which have been alledged in support of it by so very able a defender of it as Lord Mansfield. For, if that opinion could have been rendered plausible and probable by any man, I presume it would have been so by Lord Mansfield. And yet we have seen how remarkably he has failed on this occasion, both in his reasonings and in his facts; I must therefore adhere to my first opinion till some better arguments are produced to make me change it.—But, as this inquiry has run into great length, in consequence of the full and particular manner in which you have examined  
the

the several historical examples adduced by Lord Mansfield in support of his opinion, and likewise of some digressions to other subjects which you have made to gratify my curiosity, I must desire you to resume the subject for a little while longer, and repeat the principal conclusions we have agreed upon in answer to the several branches of Lord Mansfield's argument, and to state them in as compact and summary a manner as you can, to the end that I may be the better able to arrange and retain them in my memory.

### ENGLISHMAN.

I think this will indeed be very proper, for both our sakes; and therefore I will endeavour to do it with as much brevity as shall be consistent with a full enumeration of the several conclusions, (relative to the main subject,) upon which we have agreed; but without any mention of the collateral and incidental subjects to which we have digressed. But even this will take up many words.

A recapitulation of the principal conclusions established in the foregoing pages in opposition to Lord Mansfield's argument in support of the sole legislative power of the Crown over conquered countries.

Y y 2

We

Conclusions  
concerning  
Lord Mans-  
field's reason-  
ings from the  
general prin-  
ciples of law  
and reason.

We have agreed, then, in the first place, that Lord Mansfield has reasoned very inconclusively in the first part of his argument, in which he endeavours to establish the king's sole legislative authority over conquered countries upon general principles of law and reason ;—That he has therein confounded the power of making war, and the summary and arbitrary authority necessarily attendant upon it, (which confessedly belong to the Crown alone,) with the power of governing conquered countries in time of peace, after they have been finally ceded by their former sovereigns to the Crown :—And that he has likewise confounded this latter power of governing a country, and exercising legislative authority over it, after it is ceded, with the power of making peace, or of either accepting the cession of the conquered country from its former sovereign, or restoring the country back to him :—And, lastly, that he has endeavoured to deduce a right of making laws for a conquered country from the right of granting away the vacant lands of it, that is, from a right of *ownership* ; which, if it were to be admitted

admitted in other cases to be sufficient for this purpose, would prove every land-owner to be an absolute monarch, or legislator, over the persons who rented, or took grants of, his land. These, I think, are the remarks we concurred in making upon the first part of Lord Mansfield's argument, in which he endeavoured to establish this sole legislative power of the Crown upon principles of law and reason.

I come now to his precedents from history, which are the cases of Ireland, Wales, Berwick upon Tweed, Gascony, Calais, New-York, Jamaica, Gibraltar, and Minorca.

Conclusions concerning the precedents from history, which were cited by Lord Mansfield.

With respect to Ireland we observed, that he argued, from king John's having, by his sole authority, introduced the laws of England into Ireland, that he therefore was the sole legislator of it; which we agreed to be by no means a just conclusion, there being a manifest difference between a power in the conquering king to introduce, once for all, immediately after the conquest, into the conquered

Of Ireland.

conquered country the laws of the conquering country, and the *regular, permanent, legislative authority* by which the laws of the conquered country may, at any time after, be changed at the pleasure of the legislators, (whoever they are,) not only by introducing into it the laws of the conquering nation, but any other laws whatsoever, and this as often, and in as great a degree, as the legislators shall think fit. And we further observed, that Lord Coke, in the passage quoted from this report of Calvin's case, has expressly declared that the kings of England were *not* possessed of this permanent legislative authority over Ireland, not having a right to alter the laws of England, (when once introduced there by king John,) without consent of parliament; and that Lord Mansfield has adopted this opinion of Lord Coke, though it clashes with the conclusion which he laboured to draw from this case of Ireland in favour of the king's sole legislative power in the island of Grenada. And we further observed that, for some centuries past, at least, the laws which have been made for the government of Ireland have been

been made either with the consent of the parliament of England, or with that of the parliament of Ireland. So that, upon the whole matter, Ireland appears to be a very unfit example of the exercise of such a sole legislative authority in the Crown over a conquered country as Lord Mansfield asserted to have belonged to it in the case of the island of Grenada before the publication of the royal proclamation of October, 1763. These, I think, are the principal remarks we agreed upon concerning Ireland.

With respect to Wales, it appeared to us Of Wales. that Lord Mansfield had mistaken two very material facts relating to it. For, in the first place, he asserted that that country had not been a fief of the crown of England before its compleat reduction by king Edward the 1<sup>st</sup>, notwithstanding king Edward, in the famous *Statutum Walliæ*, passed immediately after the reduction of it, expressly declares that it had been so, and notwithstanding a cloud of passages in that venerable old historian, Matthew Paris; (who lived in the reign of king Henry the 3<sup>d</sup>, king Edward's father,) which



which prove that it was in such a state of feudal subjection to the crown of England throughout all the reign of king Henry the 3d and for several reigns before. But, in opposition to these decisive testimonies, Lord Mansfield will have it that Wales had never been a fief of the crown of England before the reduction of it by king Edward, but was then, for the first time, reduced by his victorious arms, to be a dependant dominion of the crown of England; but that, for some reasons of policy, (which, however, Lord Mansfield does not state, nor even hint at,) king Edward thought proper to declare it to have been in a state of feudal subjection to the Crown before his conquest of it. And here we observed that Lord Mansfield reasoned inconclusively even from his own assumed state of the fact. For, if Wales had not been a fief of the crown of England before king Edward's reduction of it, but had been (as Lord Mansfield supposes) an absolutely independant state until that time, yet, if king Edward had, for any reasons of policy, thought fit to consider it (though falsely) as having been before in a state of feudal

feudal subjection to the Crown, such a plan of policy in king Edward would have rendered Wales an unfit example of the exercise of the power of a king of England over a conquered country; because it must be supposed that king Edward would, in such a case, have exercised only such rights of government over it as were compatible with the political situation in which he would have thought fit to place it, which would have been that of an antient fief of the Crown reduced into possession. And we observed also that he had misconceived another material fact relating to this country, with respect to the power by which laws were made for the government of it after its reduction by king Edward. For he asserts that king Edward made laws for it by his own single authority, notwithstanding it is expressly declared by that king himself in the preamble of his famous *Statutum Walliæ*, above-mentioned, that the laws he then established for the government of it were made *de consilio procerum regni nostri*, or by the consent of his parliament.

These mistakes we observed to have been made by Lord Mansfield in what he said concerning those two great examples of Ireland and Wales ; which are also of too great antiquity to have much weight in determining a question concerning the constitution of the English government at this day.

We then observed that all the other instances that were mentioned by him, except those of Gibraltar and Minorca, are of no importance to the question. These instances were the town of Berwick upon Tweed, the dutchy of Guienne, or Gascony, the town of Calais in France, the province of New-York in North America, and the island of Jamaica.

Of Berwick  
upon Tweed.

All that he says of Berwick upon Tweed is, that it was governed by a royal charter. But that circumstance is no proof that the king was the sole legislator of it, any more than he is of the cities of York, Bristol, Exeter, and twenty other towns in England, which are governed also by royal charters. And even that charter of Berwick appears to have been confirmed by act of parliament in the reign of king James the first.

As

As to the dutchy of Guienne, or Gascony, and the town of Calais in France, they were not acquired by the kings of England by conquest, but by marriage and inheritance, and consequently can afford no example of the power of the Crown over conquered countries.

Of the dutchy of Gascony and the town of Calais, in France.

And the province of New-York in America is an unfit example for this purpose, because, though perhaps in truth it might be a mere conquest made upon the Dutch in the year 1664, after they had been many years in quiet possession of it, yet it was not so considered by king Charles the second, who took it from them, but was claimed and seized upon by his order as a part of the territory of the more antient English colony of New-England, into which, it was pretended, the Dutch had intruded themselves without the permission of the Crown. And, upon this ground of an already-existing right to it in the crown of England, it was granted away by K. Charles the 2d to his brother, the duke of York, before ever the fleet, which was sent to take possession of it, had sailed from England; and it was

Of the province of New York.

Z z 2

taken

Of the island  
of Jamaica.

taken possession of by colonel Nicholls, as a part of the king's old dominions, before the king entered into the first Dutch war. As, therefore, it was not considered by the Crown as a conquered country, the government established in it cannot be justly cited as an example of the authority of the Crown over conquered countries.—And nearly the same thing may be said of the island of Jamaica; since Lord Mansfield tells us that he had found, upon inquiring into the history of it, that it had been almost intirely abandoned by the Spanish inhabitants of it soon after its conquest by the arms of England in the year 1655 in the time of Cromwell's usurpation, and that it was occupied only by English settlers at, or soon after, the restoration of king Charles the 2d in 1660; inasmuch that it had been considered ever since that period as an English plantation, and not as a conquered country. For, if this be true, (as I do not doubt it is,) it renders this island an unfit example of the exercise of the legislative authority of the Crown over conquered countries. I mean only, however, that it is not a *direct* example for this purpose:

pose: for *indirectly*, I acknowledge, both this island and the province of New-York may be used as arguments in favour of this authority, by reasoning as follows. "The power of the Crown over a *conquered country* must be at least as great as it is over a *planted country*, or colony. Therefore, since the king of England exercised legislative authority over the island of Jamaica for about twenty years, without the concurrence of either the English parliament, or an assembly of the people; and since the duke of York did the same thing in the province of New-York for about eighteen years by virtue of a delegation of the powers of government to him from the Crown by king Charles's letters-patent; and these two countries were not considered as conquests, but as plantations of Englishmen; it follows, *à fortiori*, that in countries that are not only conquered, but considered as conquered, the Crown may lawfully exercise the same authority." This would have been a tolerably plausible argument, and much stronger than any of those which Lord Mansfield made use of in that judgement. But he did not make use of this argument;

Of both Ja-  
maica and  
New-York.

argument; and indeed could not, consistently with the opinion he delivered concerning *planted countries*, or colonies: for in these he declared that the king alone *had not* the power of making laws and imposing taxes, but the king and parliament conjointly, or the king and the assembly of the freeholders of the colony conjointly, agreeably to the opinion of Sir Philip Yorke and Sir Clement Wearg in the year 1722 concerning the island of Jamaica. He could not, therefore, make use of the foregoing argument *à fortiori* in favour of the king's sole legislative authority over conquered countries, which is built upon the supposition of his Majesty's having had such an authority over *planted countries*, or colonies; because he denied the existence of the latter authority, which is its foundation. According to Lord Mansfield's doctrine, therefore, of the king's *not* being the sole legislator of planted countries, the instances of New-York and Jamaica cannot afford the above indirect argument *à fortiori* in support of the king's sole legislative authority over conquered countries. Nor can they afford a direct argument, independently

ently of the consideration of planted countries, in support of this authority; because those places, or provinces, (though really conquests,) were considered and treated as planted countries. And therefore they ought not to have been cited by Lord Mansfield as proofs of the said authority.—As to the opinion of such lawyers (if there are any such at this day) as would go further than Lord Mansfield in their notions of the king's legislative authority, and would say, that the king is the sole legislator not only of all conquered countries, but of all *planted* countries in which he has not divested himself of his authority by some charter or proclamation, I shall say nothing to it but that I agree with Lord Mansfield in considering the opinion of such lawyers as erroneous with respect to planted countries, and that I am inclined to go beyond Lord Mansfield in thinking it likewise erroneous with respect to conquered countries, or, at least, that the arguments adduced by his lordship in support of it in that latter case, are not sufficient to establish it.

As



Of Gibraltar. As to Gibraltar and Minorca, in which the king has made from time to time some regulations by his orders in his privy council, we have observed that the former of these places is really nothing more than a garrison-town, without an inch of ground belonging to it beyond the fortifications; and that the

Of Minorca. latter of them, though an island of some extent, has always been considered by the people of England in nearly the same light, or as an appendage to the fortress of St. Philip's castle, which defends the harbour of Mahon;—that its civil government has been intirely neglected by the ministers of state in Great-Britain ever since the conquest of it, and that no attempt has been made to encourage the profession of the Protestant religion in it, or to introduce the English laws there, even upon criminal matters; and yet that the state of the laws, which are supposed to take place there, is so uncertain and undetermined, that, (though the old Spanish laws are supposed to be in force, and most frequently appealed to,) the inhabitants sometimes plead the English laws. And from these circumstances of neglect, confusion, and

and uncertainty,——and likewise from the small importance of the subjects upon which the kings of Great-Britain have exercised a legislative authority over these places by their orders in council, (no laws for creating new felonies or capital crimes, or for imposing taxes on the inhabitants of those countries, or for any other very important purpose, having ever been made with respect to them,) ——we concluded that neither this island nor the town of Gibraltar were fit examples to prove Lord Mansfield's assertion concerning the sole legislative authority of the Crown over conquered countries.

These were the principal remarks we made upon Lord Mansfield's second ground of argument in support of the sole legislative authority of the Crown over conquered countries, which consisted of historical examples, which were supposed to be precedents of the exercise of such an authority.

I come now to Lord Mansfield's last head of argument in support of this authority; which consisted of the opinion of the judges, as reported by Lord Coke, in Calvin's case,

VOL. II.

A a a

and

Conclusions concerning the opinions of judges and other eminent lawyers, which were cited by Lord Mansfield.

and of that of Sir Philip Yorke and Sir Clement Weirg, (attorney and solicitor general to king George the 1st,) in the year 1722, on a question referred to them concerning the island of Jamaica.

Of the opinion of the judges in Calvin's case.

Concerning the opinion of the judges in Calvin's case we observed in the 1st place, that it was extrajudicial, having little, or no, relation to the question then under consideration, which was, "whether a person born in Scotland since the accession of king James the 1st to the crown of England, was to be considered as a natural-born subject in England as well as in Scotland, so as to be intitled to purchase land, and maintain actions at law for the possession of it, in the former kingdom as well as in the latter." And, upon this ground of its being extra judicial, we concluded that this opinion of the judges concerning conquered countries was not to be considered as decisive upon the subject.

In the second place, we observed that this opinion of the judges, concerning the power of the Crown over conquered countries, was intermixed with another opinion, concerning the

the difference between Pagan and Christian conquered countries; which was so unreasonable, illiberal; and unjust, that Lord Mansfield said it had long ago been most deservedly exploded. Now, if the opinion of these judges on the latter subject is so very contemptible, it must, surely, lessen our respect for the wisdom and judgement of the judges who delivered it, and consequently must take off much of the weight which their other opinion, concerning Christian countries conquered by the arms of England, would otherwise derive from their authority.

point of view  
of the law  
of the land  
of the people  
of the nation  
of the world

In the 3d place, we observed that it appears from the history of those times, that the judges, who determined Calvin's case, were considered by many persons of that age as having acted with a servile degree of complaisance to king James on that occasion; which may be supposed to have influenced them in the opinions they delivered upon incidental points that were mentioned in the course of their arguments, as well as in their opinion upon the main question then in dispute before them. And this considera-

tion must contribute to lessen the authority of their opinions upon those incidental points as well as upon the main point, and consequently that of their opinion, so much relied upon by Lord Mansfield, concerning the power of the Crown over conquered countries.

That opinion of the judges is really contrary to Lord Mansfield's opinion.

And, in the 4th and last place, we observed that this opinion of Lord Coke and the other judges in Calvin's case, concerning the legislative power of the Crown over conquered countries, is not the same with Lord Mansfield's opinion upon this subject, but materially different from it. For Lord Coke ascribes to the Crown only the power of changing the laws of the conquered country, *once for all*, upon the conquest of it, and introducing the laws of England in their stead: but he adds that, when once the king has introduced the laws of England into the conquered country, he cannot afterwards alter them without the consent of parliament; which is saying, that the king and parliament conjointly, and *not* the king alone, are possessed of the permanent right of legislation over it. So that this

this authority of Calvin's case, (such as it is,) is rather adverse than favourable to Lord Mansfield's doctrine upon this subject.

These are the observations we made with respect to this opinion of the judges in Calvin's case, upon which Lord Mansfield laid so great a stress.

The only remaining authority cited by Lord Mansfield was the opinion given by Sir Philip Yorke and Sir Clement Wearg in the year 1722 upon a question that was referred to them concerning the island of Jamaica.

Of the opinion of Sir Philip Yorke and Sir Clement Wearg in 1722.

This opinion, we acknowledged, did really co-incide with Lord Mansfield's opinion upon the authority of the Crown over conquered countries, though the opinion of the judges in Calvin's case did not. But we agreed that, as those learned gentlemen were at that time in the service of the Crown in the offices of attorney and solicitor general to king George the 1st, (which must naturally be supposed to have given them some degree of

byas

by its in favour of the prerogative of the Crown, and this opinion appears to have been given by them in a very hasty and negligent manner, (since they did not take the pains to inquire, and to form a judgement, whether Jamaica ought to have been still considered as a conquered country, or had, by the conduct of the Crown in the government of it since the restoration in 1660, been brought into the condition of a planted country, or colony; which was so necessary to their giving an useful and satisfactory opinion upon the matter referred to them;) I say, we agreed that, for these reasons, this opinion of theirs was not intitled to much regard with respect to the decision of the important question which is the subject of our present inquiry.

And thus we completed our discussion of Lord Mansfield's third and last head of argument, which was grounded on the opinions of judges and other learned lawyers.

This, I presume, is the kind of recapitulation which you wished me to make to you, of the principal conclusions we had agreed on in the course of our examination of Lord Mansfield's opinion upon this subject.

FRENCH-

End of the  
recapitulation  
begun in p.  
347.

## FRENCHMAN.

It is: and I am much obliged to you for making it; as it enables me to carry off these conclusions, which we have agreed on, more easily than I otherwise could do. Nor do I think of any thing further to trouble you about upon the subject. And yet, before I intirely quit it, I must beg leave to express my surprize at the *very positive and peremptory manner* in which Lord Mansfield asserted this power of making laws for conquered countries to belong to the Crown. "No dispute, says he, was ever started before upon the king's legislative right over a conquest. It never was denied in Westminster Hall; it never was questioned in parliament." And again, "No book, no saying of a judge, no opinion of any counsel, publick, or private, has been cited on the other side; no instance has been found in any period of our history, where a doubt has been raised concerning it." These are strangely confident expressions, considering the weakness of the proofs he adduces in support of them; to which, indeed,

A remark on Lord Mansfield's peremptory manner of asserting the sole legislative authority of the Crown over conquered countries.



indeed, they form a remarkable contrast. This, I confess, has surprized me in a man so much celebrated for his learning and abilities as Lord Mansfield. I therefore wish to know how you account for it; and the rather, because this extream positiveness in a man of his abilities has a tendency to dazzle and overbear my judgement, and make me yield implicitly to his opinion, notwithstanding I have satisfied myself, by our discussion of this subject, that the reasons he has adduced in support of it, are very weak.

### ENGLISHMAN.

Your remark is very just. There is a strange degree of positiveness in his assertions, that is very ill suited to the weakness of his arguments in support of them. And what makes it the more surprizing is, that he himself ordered this case of *Campbell* and *Hall* to be argued no less than three times, on three different days, at the bar, before he decided it; which would, surely, have been unnecessary, and, consequently, injurious to the parties (by forcing them to suffer a needless delay, and incur an unnecessary degree of expence,

expeuce, in the prosecution of their legal claims,) if the matter had been so extremely clear and free from doubt as he, in delivering his judgement, represents it. But that positiveness of assertion is agreeable to his constant manner of speaking, and may, perhaps, be considered as one of the ingredients of his species of eloquence, as it certainly has the effect you mention, of dazzling, for a time, and overbearing his hearers into an acquiescence in the truth of the propositions he so peremptorily asserts. But you, who have examined the reasons adduced by him in support of his assertion concerning the present subject, and have found them to be insufficient, ought to break through the enchantment, and to yield to the conclusions of your own understanding, and embrace what appears to it to be the truth ; agreeably to the old Latin proverb, *Amicus Plato ; Amicus Socrates ; sed magis amica veritas*. However, to take off something of the impression which you say those positive assertions of Lord Mansfield; which you just now repeated, are apt to make upon your mind, I will endeavour to shew you that most of them might

Assertions of an opposite tendency to those of Lord Mansfield may be made with equal truth.

be changed into others of an opposite tendency, which should be either as nearly, or more nearly, agreeable to the truth : though yet, I confess, they will not be decisive of the question against the legislative authority of the Crown, any more than Lord Mansfield's assertions are decisive in favour of it; because both those assertions and Lord Mansfield's, (to which they are opposed,) are negative propositions, from which no certain conclusions can be drawn.

Lord Mansfield's first assertion, concerning the king's legislative power over a conquest.

Lord Mansfield says in the first place; " That the king's legislative right over a conquest has *never been denied* in Westminster-Hall." Now, if this assertion were true, it would prove nothing, unless this legislative right had been frequently asserted in Westminster-Hall, and made the ground of some proceeding there; which it has not. We may therefore change this assertion into the following ; " The king's legislative right over a conquest has *never been asserted* in Westminster-Hall." And this latter assertion is as near the truth as Lord Mansfield's, or rather nearer to it. For the king's legislative power

A counter assertion, that is equally true.

power over a conquest has not been asserted in Westminster-Hall, as I believe, above two, or three, times; and that by single judges, and in a slight, occasional, and extrajudicial manner: but (if we understand by it the full, and proper, and permanent legislative power, and not the power of introducing, once for all, the laws of England into the conquered country,) the king's legislative power over a conquered country was denied by Lord Coke and almost all the other judges in Calvin's case, where they said, "that, when once king John had introduced the laws of England into Ireland, no subsequent king could alter them without the consent of parliament." You see, therefore, that this first assertion of Lord Mansfield, "That the king's legislative right over a conquest has never been denied in Westminster-Hall," is not true; and that, if it were true, it would not be material to the decision of the main question, unless the said legislative right had been frequently asserted in Westminster-Hall, and made the ground of some proceeding there; which it has not,

Lord Mansfield's second assertion on the same subject.

A counter assertion that is equally true.

Lord Mansfield's next assertion is, " That the king's legislative right over a conquest was never questioned in parliament." Now we may assert, I believe, with equal truth, " That it never was acknowledged, or asserted, in parliament." And the reason of both these equally true, but very different, propositions, is, that the Parliament has never had occasion to consider the conduct of the Crown with respect to any conquered countries, since we have any memorials of the debates in Parliament; which is only from the reign of king Edward the 6th, or about the year 1550: and indeed, I believe, we may go further, and say, that the Crown has made no new conquests since that period, to be the objects of this supposed legislative authority, except the province of New-York, the island of Jamaica, the town of Gibraltar, and the island of Minorca, of which we have seen that the two first, (though in truth they were conquered from the Dutch and the Spaniards,) were always considered as planted countries, or colonies, and the two last have been considered by the English nation as mere garrison towns, or fortresses, no otherwise worthy

worthy of notice than as they defend the harbours of Gibraltar and Port Mahon, which are useful to the British trade in the Mediterranean. However, I will not take upon me to say with any degree of confidence, either, “ that the king’s legislative right over a conquest has never been denied in parliament,” (as Lord Mansfield asserts) or “ that it has never been acknowledged, or asserted, in Parliament;” because I do not pretend to be well enough acquainted with the many folio volumes of the Journals of the two houses of parliament, to venture upon either of these assertions, or rather negations: but I am inclined to think they are both true: and in that case one of them may fairly be set against the other.

Lord Mansfield’s next, or third, assertion is, “ That no book, no saying of a judge, no opinion of any counsel, publick or private, has been cited on the other side.”

Now, in answer to this assertion, it may be truly asserted that, “ No book, no saying of any judge, no opinion of any private counsel, (that is, of any counsel that was uninfluenced

Lord Mansfield’s third assertion on the same subject,

A counter assertion to it, that is more agreeable to truth.

“ influenced by the possession of a precarious  
 “ office held at the pleasure of the Crown,)   
 “ and but one opinion of any publick coun-  
 “ sel, (or counsel in possession of such offi-  
 “ ces,) namely, that of Sir Philip Yorke and  
 “ Sir Clement Wearg, in the year 1722,  
 “ (and that opinion seems, upon other  
 “ grounds, to have been a very hasty one;)   
 “ has been cited by his Lordship in support  
 “ of this legislative authority of the Crown  
 “ over conquered countries.” I say this as-  
 sertion may be truly made in opposition to  
 Lord Mansfield's: for the saying of the judges  
 in Calvin's case (which is the only opinion of  
 any judges, which Lord Mansfield has cited  
 in support of this authority) appears, upon  
 examination, to be adverse to his Lordship's  
 doctrine. And thus we shall have assertion  
 against assertion concerning the want of opi-  
 nions of judges and other learned men upon  
 this subject, supposing the assertion of Lord  
 Mansfield to be true. But these assertions  
 prove nothing on either side. The want of  
 the opinions of judges and other learned men  
 concerning a question never agitated, affords  
 us no grounds for the decision of it; and  
 there-

therefore we must have recourse to other methods of investigation in order to satisfy ourselves concerning it.

But Lord Mansfield's assertion, that "No book, no saying of a judge, no opinion of any counsel, publick or private, has been cited on the other side," is not strictly true.

For the opinion of *Vattel*, a learned modern writer on the law of nations, was cited on that side: and, as this question seems rather to belong to the law of nations than to the municipal law of England, such an authority ought not to be disregarded. *Vattel's* work is writ in French: but I have an English translation of it, in which the passage relating to this subject is expressed in these words.

"It is asked, to whom the conquest belongs; to the prince, who made it, or to the state? This question ought never to have been heard of. Can the sovereign act, as such, for any other end than the good of the state?—Whose are the forces employed in the war?—Even, if he had made the conquest at his own expence, out of his own revenue, or his proper and patrimonial estates,

The opinion of *Vattel* was cited at the trial in opposition to Lord Mansfield's doctrine of the king's being the sole legislator of conquered countries.



“ estates, does he not make use of his sub-  
 “ jects arms? Is it not their blood that is  
 “ shed?—And, even supposing that he had  
 “ employed foreign, or mercenary, troops,  
 “ does he not expose his nation to the ene-  
 “ my’s resentment? Does he not draw it into  
 “ the war, while the advantage is to be his  
 “ only?—Is it not for the cause of the state,  
 “ and of the nation, that he takes arms?  
 “ Therefore all the rights proceeding from  
 “ it appertain to the nation. If, indeed, the  
 “ sovereign makes war for a cause personal  
 “ to himself, as, for instance, to ascertain a  
 “ right of succession to a foreign sovereignty,  
 “ the question is altered: such an affair would  
 “ be foreign to the state; but then the na-  
 “ tion should be at liberty either to assist its  
 “ prince or not concern itself. And, if he  
 “ is impowered to make use of the national  
 “ force in support of his personal rights, such  
 “ rights are no longer to be distinguished  
 “ from those of the state.” The meaning  
 of this passage, as applied to Great-Britain,  
 seems to be, that every country conquered  
 by the British arms is an acquisition to the  
 British nation, and not to the king alone;—  
 that

that its publick revenue becomes part of the publick revenue of Great-Britain, as much as the taxes raised in Great-Britain itself, and is to be disposed of in the same manner, and for the same publick uses, as those taxes, instead of belonging to the king's privy purse; — and that the power of imposing new taxes on the inhabitants of such country, and likewise that of making new laws for their government, must belong to the same body of men as is lawfully possessed of those powers in the kingdom of Great Britain itself; that is, to the King, Lords, and Commons of the kingdom, conjointly; they being the body who legally represent the whole people of Great-Britain, and are invested with the whole authority originally inherent in, and derived from, the said people, or, according to Vattel's expression, the said state or nation.

This passage from Vattel's book on the law of nations was cited in one of the arguments of this cause of *Campbell* and *Hall* before Lord Mansfield: and therefore he ought not to have said that *no book* was cited on that side of the question. If he meant that no book

VOL. II.

C c c

of

of English law was cited on that side, he should have confined his expression to that sort of book.

Nor is Lord Mansfield's assertion above-mentioned, "That no book, no saying of a judge, no opinion of any counsel, publick or private, has been cited on the other side," strictly true with respect to the second article of it, *the sayings of judges*, any more than with respect to the first article, *of authorities from books*. For we have seen that, upon examination, the opinion of the judges in Calvin's case appears to be an authority on that side of the question: since the judges there affirm, that, when once king John had introduced the laws of England into Ireland, no subsequent king could alter them without the consent of parliament; which is saying, that the legislative authority over conquered countries does not belong to the king alone, but to the king and parliament conjointly.

There are two opinions of attornies-general that seem unfavourable to Lord Mansfield's doctrine of the

As to the opinions of lawyers on this subject, it may, perhaps, be true (as Lord Mansfield asserts,) that none were cited in the arguments in that cause on that side of the question.

sole legislative authority of the Crown over conquered coun-

question. Yet I have met with two opinions of very respectable lawyers that incline much to that side of the question, though they may not intirely adopt it. These are the opinions of Sir William Jones, who was attorney-general to king Charles the second, and Mr. Lechmere, who held the same office under king George the 1st: and they were given while those gentlemen respectively held that office under the Crown; which gives those opinions an additional weight; because, the byas on their minds arising from their possession of that office, having probably been in favour of the Crown, an opinion against the prerogative of the Crown must have been the effect of strong conviction. Sir William Jones was attorney-general to king Charles the second, in the year 1679, in the time of the ferment about the Popish Plot, while that king (though fond of arbitrary power,) was obliged, by the spirit of the times, to employ some honest and popular men in his service, and to pass some popular laws for the preservation of publick liberty. He executed this office with great applause, and was reckoned to be the most learned lawyer of

These are the opinions of Sir William Jones and Mr. Lechmere.

Of Sir William Jones.

that time ; Sir Matthew Hale, the great chief justice of the King's Bench, being then dead : and he was also esteemed a very honest man, and a lover of his country. Now it is said in the life of Sir William Phips, page 23, (as it is quoted in Mr. Smith's history of New-York, from which I take it,) that this Sir William Jones told king Charles the 2d,

The opinion  
of Sir William  
Jones.

*" That he could no more grant a commission to  
" levy money on his subjects in the plantations,  
" without their consent by an assembly, than  
" they could discharge themselves from their al-  
" legiance."*

According to this account of this learned lawyer's opinion, it is not certain whether he had, or had not, in his mind, when he gave it, the distinction between *planted countries*, or colonies, and *conquered countries*, and whether he meant to deny the right of the Crown to levy money by its own single authority in both these sorts of dependant countries, or only in the former. But, according to other accounts of this same opinion, it appears to have related to *conquered countries* as well as *planted ones*. For in a letter written by the  
house

house of representatives of the province of the Massachusetts Bay, in the month of January, 1768, to the Earl of Shelburne, (who was at that time one of his Majesty's principal secretaries of state,) it is recited in these words; " Sir William Jones, an eminent jurist, declared it as his opinion, to king Charles the second, *That he could no more grant a commission to levy money on his subjects in Jamaica, without their consent by an assembly, than they could discharge themselves from their allegiance to the Crown.*"

Another account of the same opinion.

In this account we see that this opinion related to Jamaica; which was a conquered country. The only remaining doubt therefore is, whether Sir William Jones, when he gave this opinion, considered Jamaica as continuing still in its original state of a conquered country, or whether he supposed its political condition to have been altered by the events that had happened to it since its conquest, (such as the withdrawing of the Spanish inhabitants from it, and the accession of Englishmen to it, who were invited by the king's proclamation to come and settle in it,)

so

so as to have been thereby converted into the political condition of a colony, or country that had been originally planted by Englishmen under the king's authority ; which is the light in which Lord Mansfield seems to think that island ought to have been considered in the year 1722, when Sir Philip Yorke and Sir Clement Wearg gave their opinion concerning it. But there may be a great deal of difference between the condition of Jamaica, in the year 1722, and its condition in king Charles the 2d's time, about the year 1677, or 1678, when this opinion probably was given : and the reasons for considering it as having changed its political state from that of a *conquered* to that of a *planted* country, or colony, were much stronger in the year 1722 than at the other period. For during the greater part of Charles the second's reign, and therefore, probably, when this opinion was given, the inhabitants of Jamaica were governed only by a governour and council, without an assembly of the people : and consequently king Charles, when this opinion was given, had not yet, (by granting them the privilege of being represented by an assembly

sembly with a power to make laws and impose taxes for the publick uses of the island,) divested himself of his antecedent right to impose taxes on them, if such a right had really belonged to him. It seems therefore not unlikely that Sir William Jones, when he gave this opinion, might consider the island of Jamaica as continuing still in its original state of a conquered country, notwithstanding most of the Spanish inhabitants had left it: and, if he did consider it in that light, it is evident that this opinion of his would, in such case, be an opinion exactly in point to contradict Lord Mansfield's doctrine of the king's sole legislative authority over conquered countries.

And, agreeably to this conjecture, I find, in another account of this opinion, that Sir William Jones did consider Jamaica as a conquered country, and expressly called it so, and yet denied the king's authority to impose taxes on its inhabitants without the consent of an assembly. For in another letter of the same assembly of the representatives of the province of Massachusetts Bay, written in the  
same



A third account of the same opinion.

same month of January, 1768, as the former letter to Lord Shelburne, and addressed to Dennis De Berdt, Esq; their agent in England, they speak of this opinion of Sir William Jones in these words; " There was, " even in those times [the times before the " Revolution] an excellent attorney-general, " Sir William Jones, who was of another " mind, and told king Charles the second, " *that he could no more grant a commission to " levy money on his subjects in Jamaica, " though a conquered island, without their consent by an assembly, than they could discharge " themselves from their allegiance to the English Crown.*" If this last account of Sir William Jones's opinion is the true one, it is evident that he considered Jamaica as continuing still in the condition of a conquered country, and consequently that his opinion with respect to the king's power over conquered countries is directly contrary to Lord Mansfield's.

Of the opinion of Mr. Lechmere.

The other opinion which I mentioned as material to our present enquiry was that of Mr. Lechmere, a lawyer of considerable eminence, and esteemed a man of great integrity,

tegrity, who was attorney-general to king George the 1<sup>st</sup>. This opinion I had occasion to mention to you in our last conversation, just before I begun the account of the imposition of the duty of four and a half per cent. upon goods exported from Grenada by the king's letters patent of July, 1764. It is shortly thus. When the British ministers of state, in the year 1717, had a design of advising the king to impose, by his royal prerogative, the said duty of four and a half per cent. on goods exported from the island of Jamaica and the little islands of Anegada and Tortola, which are situated at a small distance from St. Christopher's, they consulted Mr. Lechinere, the attorney-general, upon the legality of the intended measure. And he, thereupon, honestly told them, "*that the person who should advise his majesty to take such a step, would be guilty of high treason.*" But I do not know whether he considered Jamaica as still continuing in the state of a conquered island, or not. If he did, this opinion of his would be an opinion exactly in point to our present subject, and directly contrary (as well as the opinion of Sir Wil-

VOL. II.

D d d

liam

nam Jones, according to the last account of it,) to the doctrine of Lord Mansfield concerning the sole legislative authority of the Crown over conquered countries.

These two respectable opinions, against the said supposed legislative authority of the Crown, may fairly be set in opposition to the opinion of Sir Philip Yorke and Sir Clement Wearg, so much relied on by Lord Mansfield, in support of it.

End of the  
examination  
of Ld. Mans-  
field's per-  
emptory as-  
sertions.

You now, I hope, are satisfied that Lord Mansfield's peremptory assertions, "that no  
" doubts had ever been entertained by any  
" lawyers, before the said case of Campbell  
" and Hall, concerning the king's sole le-  
" gislative authority over conquered coun-  
" tries," are not quite agreeable to the truth, but that some lawyers of character in former times have presumed to entertain a different opinion, and even to tell the king's ministers that they did so. And consequently you should shake off from your mind that over-  
great awe and deference to that learned Lord's opinion which the peremptory manner of  
his

his making those assertions had impressed upon it, and should boldly venture to entertain that opinion upon the subject which, upon the full inquiry you have made into it, appears to you to be the most reasonable.

## FRENCHMAN.

I will endeavour to do so, as far as I am able. But, I protest, I find it difficult; as his authoritative manner of making these assertions does still retain some influence over my mind, notwithstanding you have now convinced me that they are neither altogether true, nor decisive of the matter in question, if they *were* true. However, upon the whole, I do venture to conclude that the reasons he has given in support of his opinion, “ that the king alone has a legislative authority over conquered countries,” are far from being sufficient to maintain it. I should therefore continue to hold the opinion which at first appeared to me most reasonable, to wit, “ that the king and parliament conjointly, and not the king alone, had a right to make laws for the inhabitants of conquered countries, and to impose taxes on them.”

D d d 2

if

An enquiry how far Lord Mansfield's declaration of his opinion, in favour of the sole legislative power of the Crown over conquered countries, in the judgment he delivered in the case of Campbell and Hall, is decisive of the law upon that subject.

if it were not for one remaining difficulty, concerning which I must desire the assistance of your opinion. This difficulty is grounded on the authority which Lord Mansfield's doctrine may, perhaps, derive from the very circumstance of its being his opinion, and having been delivered by him, as such, in his judicial capacity on a question that brought the subject regularly before him for his decision; more especially, if we consider the silence of the other judges of the court of King's Bench, when Lord Mansfield delivered this opinion, as implying their concurrence with him in it. For in this case it may be said, that, on the only occasion on which this doctrine "of the king's sole legislative power over conquered countries" has been brought into question before an English court of justice, it has been decided in favour of the Crown by the unanimous opinion of all the judges of the court; and that, whatever the law might be before, such a decision must be considered as settling it for the future in favour of the said power of the Crown, or must be a peremptory guide to all future courts of justice in their decision of the same question,

question, as often as it shall occur before them. I should be glad to know, therefore, what you think of this conclusion, and whether, by the rules observed by English courts of justice with respect to points already decided by the same or other courts, such a question ought to be considered as having been decided for ever in favour of the Crown by this one decision of Lord Mansfield and the court of King's Bench. If it is to be so considered, I must needs think that Lord Mansfield and his brother judges will, by that opinion of theirs in their judgement on the case of Campbell and Hall, have, *indirectly*, made a law of the most capital importance to Great-Britain and the British dominions.

### ENGLISHMAN.

Your question is a very proper one, and not a very easy one to answer ; there being no express law, nor even constant usage, that ascertains, in all cases, the degree of deference which is to be paid by courts of justice to the former judicial decisions of the same or other courts of justice. And we have seen Lord Mansfield himself, since he has been chief justice

The courts of justice sometimes determine points of law in a manner that is contrary to their own former decisions of them.

justice of the King's Bench, and his brother judges of that court, in more than one instance, determine a point of law in a manner directly contrary to the determination of it by all the judges of the same court of King's Bench on a former occasion, though the said former determination had been acquiesced in by the party against whom it had been made, and had been taken and reputed for good law ever after, till the new case in which Lord Mansfield and the other judges of the court of King's Bench determined the point in a different manner. I particularly remember an instance of this kind in a case in which the names of the parties were *Wyndham* and *Chetwynd*, containing the qualifications necessary to the three witnesses who, by a certain statute made to prevent frauds, are required to attest and subscribe a will of lands, in order to its validity. But the general rules concerning the authority of judicial determinations of points of law I take to be as follows.

A remarkable instance of this kind.

General rules concerning the authority of judicial determinations of points of law.

In the first place, where a point of law has been agitated in all the courts through which it may be carried by appeal, or writ  
of

of error, and has been finally determined by a judgement of the highest court of appeal, that is, of the house of Lords, (for that is, in Great-Britain, the highest court of appeal both in matters of law and equity;) such a determination is reckoned to be of almost as much authority with respect to the point so settled, as an act of parliament; or, at least, it is so considered by all the ordinary courts of justice, though, perhaps, the house of Lords itself might, on another occasion, if they thought there was very strong ground for it, determine it in a different manner.

In the second place, when a point of law has been fully argued, and solemnly determined by one of the four great courts of Westminster-Hall, that is, the court of Chancery, the court of King's Bench, the court of Common Pleas, and the court of Exchequer; and the party, against whom the judgement has been given, has acquiesced in it, and has forborn to bring an appeal, or a writ of error, into the next higher court of justice, to which the right of revising the judgements of the first court, and correcting the errors in them, belongs;



belongs; and such forbearance does not arise from the poverty or inability of the said party to bear the expence of prosecuting such writ of error, or appeal to the next higher court; such a determination acquires a great degree of respect and authority in Westminster-Hall, and is usually adopted and followed by the courts of justice in their subsequent determinations of the same point of law, as often as it comes before them. Yet it is not of quite so great authority as a determination of the house of Lords upon a question brought there in the last resort: and we have sometimes seen such determinations overturned by subsequent determinations of the same or other courts of justice in Westminster-Hall; as was done in the court of King's Bench in the case of *Wyndham* and *Chetwynd*, which I just now mentioned to you. Yet such overturnings of the former solemn determinations of courts of justice are very unfrequent, and are not in general approved of, though, perhaps, in some very strong cases, where the former determinations have been made upon very wrong principles, they may be justifiable.

In

In the third place, when a matter has been fully argued before one of the courts of Westminster-Hall, and a solemn judgement has been given upon it in favour of one of the parties; and in the said judgement more than one point of law has been determined in favour of such party; and the losing party acquiesces in the said judgement, and forbears to bring a writ of error for a reversal of it in a higher court of justice; the determinations of such points of law acquire a considerable degree of weight and authority in the estimation of lawyers and subsequent courts of justice, but yet are not quite so much respected as the determinations in the two former cases: and for this plain reason, that, as more than one point of law are determined at the same time in favour of one of the contending parties and against the other, it is uncertain, whether the losing party, when he acquiesces under the whole judgement, and forbears to bring a writ of error in a superior court to get it reversed, acquiesces in all the points of law determined against him, or only in some, or one, of them; because, if only one of them is right-

Vol. II.

E c c

ly

ly determined against him, the judgement against him would be affirmed upon a writ of error, as much as if all the points had been so determined. This uncertainty concerning the particular points of law, in the determination of which the losing party may be supposed to acquiesce, takes from the determinations of each of the points of law, that are determined against him, some part of the weight and authority which such determinations would otherwise derive from his acquiescence.

And fourthly, if a matter has been fully argued before a court of justice in Westminster-Hall, and a solemn judgement has been given upon it in favour of one of the parties; and in the said judgement one, or more than one, point of law has been determined in his favour, and another point, or points of law have been determined against him; and the losing party acquiesces in the said judgement, and brings no writ of error to reverse it; such an acquiescence of the losing party can operate as a confirmation of only those points of law which are determined against him,

him, and not of those which are determined for him. In such a case, therefore, there will be several determinations of points of law, all deliberately made by the same judges and in the same cause, which will have different degrees of weight and authority, namely, the points determined in favour of the losing party, and the points determined against him. For the points determined in favour of the losing party will have that degree of weight and authority which arises from the respect due to the learning, abilities, and integrity of the judges who have decided them, and to the deliberate manner in which they have been considered and discussed before they were decided; but those which are determined against the losing party will, besides the weight and authority arising from the foregoing circumstances, be intitled to an additional degree of respect arising from the acquiescence of the losing party, which will shew that he and his counsel, learned in the law, despair of having those points determined in a different manner, if they were to bring a writ of error for the purpose.

These seem to me to be the different degrees of authority which are attributed by the English courts of justice to the aforesaid different sorts of judicial determinations of points of law by former judges: which, I presume, you will agree with me in thinking reasonable.

### FRENCHMAN.

I enter very readily into these distinctions between the different sorts of judicial determinations, and think them very natural and reasonable. And, according to this gradation of them, it seems to me that the opinion of Lord Mansfield, delivered in the case of Campbell and Hall, concerning the sole legislative authority of the Crown over conquered countries, (even supposing the other judges of the King's Bench to have concurred with him in it,) must be placed in the fourth, or lowest, class of them. For in that case there is no room to infer any thing, from the acquiescence of either of the parties, in favour of that opinion. For, as to the defendant *Hall*, who was the losing party, all that can be inferred from his acquiescence in the

The opinion of Ld. Mansfield, concerning the sole legislative authority of the Crown over conquered countries, delivered in the case of Campbell and Hall, is a judicial determination of the fourth, or lowest, class of those above described.

the judgement given against him in that action is that he and his counsel acquiesced in the opinion of the court upon the second point, " of the immediate operation of the " king's proclamation of October 1763, as a " bar to the exercise of his antecedent legislative authority," and despaired of having it otherwise determined, if he should have brought it into the house of lords by writ of error. And as to the plaintiff Campbell, who gained his cause, he could not bring a writ of error to reverse a judgement that was given in his favour. So that the opinion of Lord Mansfield upon that first point must, indeed, be considered as the opinion of that learned Lord, and, perhaps, of the whole court of King's Bench, upon a point that had been fully argued before them, and must be intitled to all the respect which is due to it on that account, but cannot derive any additional weight from the acquiescence of either of the parties under it; that is, it must be a judicial decision of the lowest of the four classes of judicial decisions which you have been just now describing.

E N G-

## ENGLISHMAN.

It is exactly so. The opinion of Lord Mansfield upon that first point is a decision of that fourth and lowest class. And therefore I suppose that it would not be considered by the same or any other court of justice in Westminster-Hall, on any other occasion in which the same point, "of the king's legislative authority over conquer'd countries," should occur, as being absolutely binding and decisive of the question, so as to be intitled to the confirmation of such court of justice, though the reasons on which it was founded should be intirely disapproved by the judges of which such court should be composed; since we have seen, in the case of *Wyndham* and *Cbetwynd*, (which was determined by Ld. Mansfield himself) that even a decision of the second class is not always so considered. But yet it would certainly have considerable weight with the judges of such subsequent court of justice, so as to induce them to give judgement agreeably to it, if they were only in a state of doubt concerning the validity of the reasons on which it had been grounded,

and

and did not thoroughly disapprove them. So that I am afraid we must allow, that (weak and ill-grounded as it appears to you and me,) this opinion of Lord Mansfield, concerning the king's sole legislative power over conquered countries, is a temporary judicial determination of that question in favour of the prerogative of the Crown. But, as you rightly observed, it is a decision of the fourth, or lowest, class of the several sorts of judicial determinations above described.—But I hope your curiosity is now satisfied with respect to this important question of law, concerning the supposed sole legislative authority of the Crown over conquered countries, which, I think, we have very sufficiently discussed.

### FRENCHMAN.

My curiosity is, indeed, satisfied on this subject: but the pleasure I have had in the inquiry is allayed with some mixture of uneasiness arising from the weight that may be thought to belong to that opinion of Lord Mansfield. For how can any lover of liberty and the English constitution (as I most  
sincerely



sincerely profess myself to be) not be sorry to find, that the only judicial decision that has been made upon the subject, has ascribed to the Crown alone, without the concurrence of the parliament, a power to make laws and impose taxes at pleasure on the inhabitants of all countries that are conquered by the British arms?—I therefore hope, either, that the law upon this subject will soon be altered by an express act of parliament for the purpose, or that the question may again be brought under the consideration of some court of justice, and be there determined in a different manner, as the case just now mentioned, of *Wyndbam* and *Chetwynd*, was determined, by Lord Mansfield himself and the other judges of the King's Bench, in a manner directly contrary to a former determination of the same point of law in the same court of King's Bench, though the said former determination had been a decision of the second class. For it may be of terrible consequence to the freedom of the English constitution to have so enormous a power fixed permanently in the possession of the Crown.

ENG-

## ENGLISHMAN.

I heartily join with you in these wishes : but doubt a little whether they are likely to be soon accomplished. However, if this question were again to come before a court of justice, and the merits of the cause were to turn singly upon the decision of it, (which was not the case in the action of Campbell against Hall,) I can hardly persuade myself that the judges of any court in Westminster-Hall would think themselves bound to determine it agreeably to Lord Mansfield's opinion, merely through deference to that opinion and without any new reasons that should influence their own judgements in favour of it ; seeing that the reasons alledged by Lord Mansfield in support of it have appeared, upon examination, to be so very weak, and that its authority as a judicial decision is two degrees lower than that of the case in the court of King's Bench, above alluded to, (which is called the case of *Anstey* and *Dowling*,) which was overturned by the same court in the subsequent case of *Wyndham* and *Cbetwynd*, that case having been a decision of the second class, and this being only of the fourth.

VOL. II.

F f f

But

in the judgement in the case of *Campbell* and *Hall*, concerning the sole legislative power of the crown over conquered countries.

End of the  
examination  
of the opinion  
delivered by  
Ld. Mansfield

But this is all matter of conjecture, and consequently not worthy our further consideration.

We will now, therefore, if you please, take our leave of this subject, and, with it, put an end to the present conversation : for I have not either time, or inclination, just at present, to enter upon a new subject. But in a day, or two, if you desire it, we will meet again ; and then we will consider the remaining topics which I mentioned to you in our former conversation, and which we had resolved to discuss on the present occasion, if we had had convenient time for it.

Two measures more, (besides those discussed in the first Dialogue,) seem necessary to be adopted, in order to a thorough reconciliation between Great-Britain and her colonies.

These, you may remember, were another measure, or two, which appeared to me to be highly proper to be adopted by Great-Britain in the present crisis of affairs, in order to a permanent accommodation of the unhappy differences in which she is now involved with so many of her colonies on this continent.

## FRENCHMAN.

I well remember them, and shall be glad to hear you speak of them when we are  
more

more at leisure. The first of them was, to remove from the minds of the Americans the apprehensions of having bishops established amongst them without the consent of their assemblies. And the other was, to amend the constitutions of the provincial councils in the several royal governments of America (which are governed only by the king's commissions, without a charter) by increasing, to, at least, twice their present number, the members of such councils, and appointing them to hold their seats in the said councils during their lives or good behaviour, instead of holding them at the mere pleasure of the crown. These were the two remaining measures which you considered as expedient to be adopted, in order to a thorough reconciliation between Great-Britain and her colonies. Now that these measures would be agreeable to the Americans, and consequently would have a tendency to that good end of reconciliation, is indeed too evident to need a proof. But yet I am persuaded that, besides this general tendency of them, you have some particular reasons, arising from your knowledge of the sentiments of the Ameri-

The first of those measures.

The second.

cans upon these subjects, that make you consider them as of so much importance. And these, if you have such, I shall be glad to hear at large at our next meeting.

## ENGLISHMAN.

These were, as you say, the topics that remained to be discussed by us: and I most certainly have such particular reasons as you suppose for wishing that these two measures were adopted. And, when we meet again, I will explain these reasons to you in the fullest and best manner I am able; and, perhaps, may also suggest another measure, or two, (besides those you have just now mentioned,) that would also be useful towards this important end of restoring peace and confidence between Great-Britain and her American colonies. In the mean time, farewell.

The grounds and reasons of these two measures will be explained in a third Dialogue.



*End of the SECOND DIALOGUE.*









